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To be argued by
MILTON POLLACK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 9

HOWARD LAWN,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinions of the Court of Appeals are reported at 232 F. 2d 589 (R. 2963) and 208 F. 2d 467. The opinions of the Southern District of New York (R. 2866; R. 179) are reported at 115 F. Supp. 674 and 16 F. R. D. 268.

GROUNDS OF JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit (R. 2972) affirming a judgment of the District Court for the Southern District of New York (R. 2761) comes before this Court on a writ of certiorari granted October 15, 1956 (R. 3002), reported at 352 U. S. 865. The judgment of the Court of Appeals was entered on April 20, 1956. A timely petition for rehearing (filed April 25, 1956) was denied on May 8, 1956. Lawn's petition for a writ of certiorari was filed on June 4, 1956. The jurisdiction of this Court was invoked under 28 U. S. C. § 1254 (1).

STATUTES INVOLVED.

Internal Revenue Code of 1939:

"SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

(53 Stat. 62)

18 U. S. C.

* * * * * *

"SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

(62 Stat. 701)

QUESTIONS PRESENTED.

1. Whether the use of illegally obtained evidence in violation of two court orders for its suppression and return made before trial was fundamental error infringing the petitioner's privilege against self-incrimination and depriving him of liberty without due process of law?

2. Whether the petitioner was deprived of due process of law by the action of the prosecutor in:

(a) going outside the record in summation and "vouching" for the government's witnesses who were admitted criminals and perjurers and assuring the jury that the United States Attorney's office personally believed in the truth of what they said;

(b) charging the petitioner in the course of the summation with the commission of acts of violence and crimes, though no basis in fact existed for such accusations, and similarly misbehaving on the trial;

(c) certifying repeatedly to the court that no illegal evidence had been or would be used when in fact it had been used.

3. Whether the improper conduct of the prosecutor mentioned in question 2 can be condoned by this Court in the exercise of its duty to supervise the administration of criminal justice in the federal courts?

4. Whether it was a deprivation of the defendant's constitutional rights to refuse a requested hearing during the course of the trial to determine if the prosecution was making improper use of illegally secured evidence, it being established by the record that some such evidence was improperly offered at the trial by the prosecutor and admitted by the court?

5. Whether there was sufficient evidence to convict the petitioner as an aider and abettor or co-conspirator in the absence of any proof, direct or circumstantial, of any guilty knowledge, criminal intent, or purposive entry into tax evasion allegedly committed by others?

6. Whether a conviction for conspiracy or for aiding and abetting may be grounded on the mere presence of the petitioner and on acts beyond the period of limitation and subsequent to the conclusion of the alleged crimes?

7. Whether petitioner could be convicted of aiding and abetting the commission of a crime which the alleged principal was found not to have committed and which crime could not have been committed by any one else?

8. Whether Section 145(b) of the Internal Revenue Code of 1939 makes it a felony for a taxpayer, who has properly disclosed his sources of income and properly reported his tax liability, to fail to pay his reported tax liability, regardless of whether or not he attempts to conceal his capital assets or divert his capital to uses other than the payment of taxes?

STATEMENT OF THE CASE.

Preliminary.

On July 23, 1953, the petitioner was accused under the Internal Revenue Code of 1939, Sec. 145(b), of aiding and abetting William Giglio, a taxpayer, to conceal certain of his capital assets and to fail to use the same to pay his properly reported 1946 tax obligations (Count 7), and of aiding and abetting American Brands Corporation (hereafter ABC), a taxpayer, to divert certain of its capital assets to uses other than payment of its properly reported 1946 taxes (Count 9), and petitioner was also accused under the general conspiracy statute, 18 U. S. C. § 371, of conspiracy with the taxpayers charged with evading payment of their 1946 taxes (Count 10).

The taxpayer, ABC, was not charged in Count 9 or in any substantive count of the indictment but was charged only in the conspiracy count. The jury failed to return any verdict as to ABC and the Judge dismissed the conspiracy indictment against ABC (Count 10) (R. 2747).

The jury found against petitioner on Counts 7, 9 and 10, and his motions to dismiss, for an acquittal, and in arrest of judgment were denied (R. 2075, 2097, 2504-5, 2737).

Lawn not here as a delinquent taxpayer.

The petitioner Lawn is not one of the taxpayers accused in the ten count indictment.

No tax return or tax payable by Lawn is in any wise the subject of this action. He did not owe any responsibility or fiduciary duty whatever to pay the taxes of his co-defendants, the taxpayers, or to cause them to do so.

No delinquency in the tax returns of the taxpayers.

The tax returns for 1946 of Giglio and ABC are not questioned as false in either of the substantive counts against Lawn. Charges in the general conspiracy count concerning

improper tax returns by the taxpayers are not asserted against or related to Lawn. The government has heretofore conceded as to the counts against Lawn that it does not challenge the accuracy of the amounts of income, of the tax liability reported, or of the taxpayers' reports (R. 2895-6, 2715, 2717).

Lawn had no personal interest at stake.

Lawn had none of the taxpayers' assets in his possession or under his control. He had no stake in and could derive no personal advantage from thwarting the collection of the taxes due for 1946 from the others, the taxpayers at bar.

The "concealment" charges against the taxpayers in the indictment proceed on a notion that failure to pay one's debts for taxes (as distinct from an attempt to thwart the imposition of taxes by concealing facts as to one's income or deductions) may nonetheless be made the subject of criminal indictment under the tax laws. The counts against Lawn rest solely on the theory that wilful failure to pay a tax, truthfully reported, constitutes a felony (R. 2715, 2717). Income taxes due for the year 1946 from William Giglio and from ABC, although reported by them in their tax returns, were paid only in minor part.

There was no evidence that Lawn had knowledge of the 1946 income of the taxpayers or of the tax due thereon, or whether it was paid or how or the extent to which the taxpayers dealt with their capital assets, or what assets they had left with which to pay tax and other creditors. Lawn did not draw any checks for any of the taxpayers or act for any of them as a paying agent.

The background of this case.

In 1945, the taxpayers Giglio and Livorsi, and their wives, formed a limited partnership called Tavern Fruit Juice Company (hereafter "Tavern") (R. 986, 998, 1017-8).

In 1945, one Lubben and his associates, on the one side, and Giglio, Livorsi and their wives, on the other side, formed a limited partnership, called Eatsum Food Products Company Ltd. (hereafter "Eatsum"). Each side had a one-half interest therein (R. 302-3).

Eatsum purchased the assets and liabilities of a sole proprietorship previously owned by Lubben (R. 305-8).

Lubben had previously been engaged in the sugar black market, and after joining forces in Eatsum he brought his black market operations to the new partnership (R. 304-5).

The two partnerships (Tavern and Eatsum) earned substantial sums, and the income thereof was taxable to the partners as their individual income.

The corporate excess profits tax was repealed effective January 1, 1946 (R. 1069), and the maximum corporate tax rate thereafter was 38% compared to the maximum individual tax rate of 86%. Revenue Act of 1945, 26 U. S. C. 11, 15.

In 1946, Giglio and Livorsi formed a group of corporations which they surnamed "American" and put their partnership assets including profits into these corporations in exchange for stock and receivables. The corporations were formed in anticipation that a process for making synthetic sugar from waste products (R. 1070), to be sold at a low price, could be perfected (R. 1124-5).

Before fruition of the research and development of this substitute for sugar, and in 1947, natural sugar was again available and enormous moneys expended on the venture (R. 1077) were lost, the corporations were thrown into involuntary state court receivership by a *bona fide* creditor named Dupont (R. 2167), and Giglio and Livorsi lost their entire investments in the corporations—some $400,000—including the profits they had transferred thereto from the partnerships (R. 1489, 1528, 1529, 1530).

The partner-taxpayers were obliged to file income tax returns and pay taxes on their profits for the tax year 1946.

They (not Lawn) desired to extend their time to pay their taxes so that money would be available to complete the tremendous scientific discoveries which were virtually at hand. They believed that within a year money would be freely available to pay all taxes due (R. 1005, 1041, 1079). They obtained extensions on the reasoning to which Reth, Giglio's accountant and an alleged conspirator, testified on direct examination as a government witness, as follows:

> "Mr. Giglio pointed out to me that if we were to pay the taxes due to the Government at that particular time, there would be no money left to continue the extensive research, and based on conferences that we have had with Mr. Ronayne, the only thing that we would be subject to, or the partnership would be subject to, would be penalty and interest, and that could always be settled when the returns are filed. Mr. Giglio also felt that money to him is worth 6 per cent during the time that he owes, that he contemplated paying the Government a year later." (R. 1005; see also 1041, 1079)

The taxpayers did not have the money when they filed their tax returns, on September 15, 1947, and did not pay their 1946 taxes (R. 2340-4). As stated above, the "American" corporations were placed in receivership in December, 1947, and their assets were insufficient to satisfy their 1946 tax liabilities (R. 2155, 2167). Giglio filed a petition in bankruptcy in 1950 (R. 2269) and was discharged (R. 2272).

Lawn in the record.

The government placed Lawn in this case by charging that he aided the taxpayer Giglio in 1947 to sell his home in New Jersey—it was sold publicly—and by accusing Giglio (not Lawn) of pocketing the proceeds instead of paying his income taxes therewith (Count 7); that Lawn converted to his own use assets of the taxpayer American Brands Corporation (salaries paid to Lawn as an employee), which it should have used to pay its 1946 income taxes (Count 9); and by charging in the general conspiracy count that Lawn conspired in these tax evasions by the taxpayers (Count 10).

Lawn was a salaried employee for import-export trade and legitimate management of and research for American Agar on the sugar project. His salary, varying from $250 to $350 per week for services admittedly rendered, was moderate in view of the scope of his duties (R. 1023, 1915-24).

Roth, the government witness, described Lawn's duties:

> "to develop the jelly product for consumer packaging purposes on a national scale, and * * * research in finding a substitute for sugar." (R. 1023)
>
> "* * * Mr. Lawn discussed research with me also, because he was vitally interested in its ultimate outcome." (R. 1070)
>
> "The purpose of the research was to find a substitute for sugar from waste product of sugar refining companies, such as black strap molasses, and certain fruits, etc. Now the research was supposed to extract from this waste material the sugar content, and if the research was successful this sugar would have a cost of possibly two or three cents a pound after the process was developed than 6 or 7 cents a pound that sugar in bags would normally cost. That is what this research is or was." (R. 1070)

Lawn also was an officer and director of some of the corporations involved (R. 1915-24), although these titles were merely nominal (R. 1142).

Lawn had provided the staff of needed chemists (R. 1140-1). Lawn's sole financial interest was as a minor stockholder in the research company, American Agar (R. 1142), and as a stockholder of a company known as Lawn International (R. 1134). The Agar operation was not successful (R. 1141). Lawn International was not named in the indictment, had no connection with the matters involved herein, and was unwarrantably injected into the case by the prosecutor over objections (R. 1204-5).

Lawn had no financial interest in any other Giglio enterprise (R. 1134, 1140-1).

The government witness, Roth, underscored the absence of any stake on the part of Lawn in the ventures of the taxpayers here involved:

> "Yes, because Mr. Lawn had absolutely nothing to do in the production of profit in manufacturing jelly of the original Tavern, American Brands Corporation, American Wholesale; therefore he is not entitled to any stock, only as an employee." (R. 1142)

The other key government witness, Lubben, eliminated Lawn as to the remainder of the taxpayers' ventures:

> "Q. Did Mr. Lawn have any official capacity with Eatsum Food Products Co. Ltd.? A. Sir, he wasn't any partner, sir, if that is what you mean." (R. 329; see also R. 303)

The Trial Judge, immediately after the trial and nine months before Lawn was sentenced, noted the employee status of the defendant Lawn as follows:

> "I do not think you are part of the enterprise, in the same class with Mr. Giglio and Mr. Livorsi. I do not say this disparagingly of you at all, but you were a man who was—I use the word 'hired' in a good sense, and not in any invidious sense, by them, very much the same way Mr. Roth was." (R. 2928)

Lawn was charged in this case with complicity because of the activities ascribed to him to head off prosecution of the others after their tax returns had been filed and their alleged tax evasion was complete. These alleged activities are not mentioned in the indictment.

No prima facie proof of the wrongdoing charged to Lawn was adduced by the government witnesses. Instead, the prosecutor claimed that "the heart of this case is fixing, it is bribery" (R. 2587). The bridge between the inadequate proofs and the charges against Lawn was the product of fertile imagination, and the prosecutor must have been as surprised as was Lawn by the unexpected verdict against him.

On the facts applicable to Lawn, alone, had they been tried separately—obviously there could not have been a conviction. Lawn's motion for a separate trial was denied (R. 250, 253).

The prosecutor and the Court below sought to spell out the existence of a case against Lawn [1] by drawing inferences of guilt from Lawn's associations with the taxpayers; [2] by inferring knowledge on the part of Lawn of the taxpayers' wrongs from legal abilities ascribed to him; [3] by pointing to Lawn's acceptance of salary for his business services; [4] by acts after termination of the alleged crimes (e.g., R. 1218-9, 1237-9, 1975) and [5] by acts of others beyond the six-year limitary period (e.g., R. 1124-5).

The adversaries on Lawn's case.

A short biography of the persons whose testimony was used to implicate the defendants will place their evidence in proper perspective.

a. Government witnesses:

The government's case depended on the word of the following two witnesses.

David George Lubben, the government's witness, was well characterized by the prosecutor himself as a person who

> "was a perjurer and a black marketeer and practically anything else you want to talk about * * *. He certainly admitted many other crimes * * *." (R. 2589)

Lubben was never prosecuted by the government for any of his crimes although his crimes were known and admitted.

Louis J. Roth, the other principal witness, was tabbed by the prosecutor as follows:

> "On Mr. Roth I think I brought out 15 or 20 different crimes. He is under indictment now for a lot. He had pleaded guilty to ten, I believe, but has admitted about ten more here. He can go to jail for 200 years." (R. 2588)

Roth was given a suspended sentence at the recommendation of the United States Attorney (R. 8).

b. Howard M. Lawn.

Roth exculpated Lawn, and assigned others to all phases of the crimes charged (R. 1005-6, 1076, 1115, 999, 1031, 1115, 1119, 1125, 1024, 1134, 1135, 1182, 1479).

Lawn is a lawyer. Graduate of Harvard Law School. Graduate of Harvard College. Former Chief of the Criminal Division of the United States Attorney's office in the District of New Jersey (R. 947, 2889).

A government witness summed up Lawn:

> "He was regarded as a very good character and an excellent lawyer in his capacity as an associate with Quinn, Doremus, McCue & Russell. I believe he was raised in Long Branch, and he had a good reputation as a young lawyer and a citizen." (R. 947)

Lawn did not function as an attorney for the taxpayers. They retained other counsel even for the simplest transaction (R. 1005-6, 1076, 1115, 1479, 2168, 2230).

Suppressed evidence was used in the attempt to connect Lawn with the crimes charged.

There was no proof of a connecting link to or a stake in the crimes on the part of Lawn. The prosecutor sought to overcome these deficiencies by showing that Lawn had in fact received a payment of $15,000 from the Tavern partnership. The thesis of the prosecution was that this represented fruits to Lawn of the alleged crimes. As proof of the alleged link the prosecutor introduced in evidence a $15,000 check and its related stub entry (Exs. 61A and 61B, R. 1021, 2998-3001). But these were neither proof of any link nor matter properly brought into the trial. This was unconstitutionally secured evidence and previously stamped as unusable because it was obtained from Lawn in violation

of his privilege against self-incrimination; and two successive judicial orders had directed its suppression and return (R. 2871, 2873, 184).

These tainted documents were not returned by the Government but were repeatedly used with material effect during the trial and on the prosecutor's summation (R. 1019-22, 2598, 2603-7, 2657-8).

The history of Exhibits 61A-B.

Criminal informations had been filed in 1950 against the taxpayer-defendants and against Lawn as an aider and abettor, charging failure of the taxpayers to pay income taxes for 1946 (R. 2763-6, 2867). The defendants pleaded not guilty (R. 2765). These informations were not brought to trial (R. 249).

In July 1952, while the informations were pending, Lawn and his co-defendants were subpoenaed by the Federal Grand Jury to testify and furnish evidence concerning the same tax matters, among other things (R. 2784-8, 2867). Lawn was sworn and questioned by the Grand Jury and in response to the subpoena produced four documents, with two of which we are here concerned: one was the check for $15,000, payable to and endorsed by petitioner, drawn by Tavern Fruit Juice Co., a partnership, and dated November 7, 1945; the other was the corresponding check stub. These documents were respectively identified as Grand Jury Exhibits Nos. 2 and 4 on July 15, 1952 (R. 2798-2804).

On instructions from the Grand Jury, photostatic copies were made by the office of the United States Attorney on July 15, 1952, which then retained the same, the originals being returned to petitioner (R. 2802-3).

The Grand Jury shortly thereafter indicted the taxpayer-defendants and Lawn as an aider on the 1946 income tax liability already the subject of the criminal informations against them. Petitioner, with other individual defendants, moved

for dismissal of the indictments on the ground that their rights under the Fifth Amendment had been infringed by the compulsion to appear and produce records before the indicting Grand Jury. On March 27, 1953, these indictments were dismissed by Goddard, *D.J.*, because they had been obtained in violation of the petitioner's privilege against self-incrimination. *United States* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y. 1953). The Judge's opinion and order directed the Government to return the partnership and personal records (including Exhibits 61A-B) produced by the defendants before the Grand Jury (R. 2871, 2873). The Judge stated:

> "* * * the Government is directed to return, to the respective defendants, the partnership and personal records produced by them in response to the subpoenas." (R. 2871)

The order signed by Judge Goddard on April 29, 1953, stated:

> "Further Ordered that the plaintiff United States of America return to the respective defendants any and all partnership and personal records produced by them in response to subpoena duces tecum served upon them in July, 1952." (R. 2873)

None of the documents produced by the defendants were immediately returned. The Government appealed from the dismissal and on July 23, 1953 (R. 2874), while the appeal was pending and prior to the return of the tainted documents, the prosecutor obtained the present indictment which is in material respects identical with the 1952 indictments (R. 10-21, 149). The Government's appeal was dismissed on October 19, 1953 as not timely taken. *United States* v. *Roth*, 208 F. 2d 467 (2 Cir. 1953).

Lawn moved in advance of trial before Palmieri, *D.J.*, to dismiss the present—the 1953—indictment, for a hearing to suppress the illegal evidence and for a hearing to examine the uses which the Government had made of the illegal evi

dence, which it had not yet returned. Lawn further requested compliance with Judge Goddard's order to return the documents taken by the 1952 Grand Jury (R. 26).

Judge Palmieri denied the motions for a dismissal or a hearing because "the weight of the affidavits presented by the Government is much greater than that of the *post hoc propter hoc* and the conjectural arguments advanced by the defendants" (R. 183). Judge Palmieri, however, did order the return of the partnership and personal records produced by the defendants before the 1952 Grand Jury (R. 184). There is no indication that the Judge himself examined the 1953 Grand Jury minutes to satisfy himself as to the reliability of the affidavits presented by the Government in which it denied use of the non-returned tainted evidence.

The two documents which petitioner had produced under subpoena, marked as Grand Jury Exhibits 2 and 4 and described above, were *never returned*. On the contrary, they were introduced in evidence by the Government at the trial, identified respectively as Exhibits 61A and 61B. Circumstances which will be described in detail below prevented recognition of these exhibits by defense counsel and the court as the illegally obtained documents.

The prosecution and the Grand Jury had promised to provide the defendants with an itemized receipt for the documents improperly obtained (R. 2858), but they never did so. When a large batch of documents was finally returned, the defendants were then being represented by new counsel (R. 125, 2767-71) and neither Lawn nor the others could tell whether all of the documents taken from them had been returned.

The defendants made recurrent motions on the trial for a hearing to establish the use of illegal evidence in the prosecution. These motions were successfully blocked by Government affidavits asserting that the tainted documents had not been and would not be used in the prosecution or on the trial (R. 244-8, 1356, 1943-5, 2076-88, 2136-7, 2505, 2878-9, 2948-53, 2955-62).

Tainted evidence used on the trial.

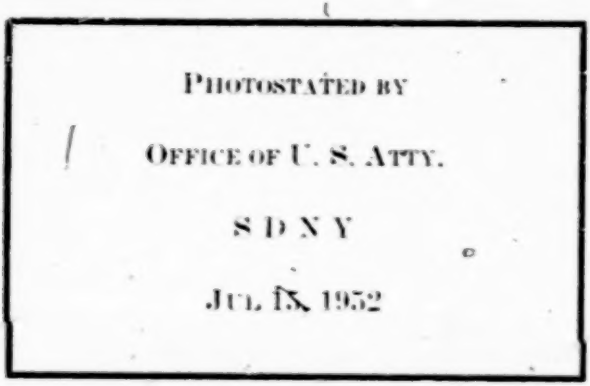
The prosecutor produced the tainted photostats of the $15,000 check and of the corresponding check stub book entry and offered them in evidence during the direct examination of his witness, the defendant Roth. He perforce could not testify to the source from which the Government had obtained these photostats. He was questioned preliminarily by the defendants concerning the handwriting and the signature on the documents and they were then admitted without objection (or this score of course) as Exhibits 61A-B (R. 1021, 2998-3001).

The first detection of the tainted character of these documents was made just before the appeal was argued in the Court below. Both sides of the check had been photostated on one sheet which had then been folded so as to give a front and back appearance. The two photostated sides of the check stub had been stapled together concealing the ostensibly blank inner sides. Close inspection of the inner sides of the photostats, during the pendency of the appeal, for the first time revealed physical markings showing that the photostats were the tainted copies made on July 15, 1952, by the prosecutor's office and taken from the originals produced by petitioner under command of the Grand Jury, as mentioned above. It was only when the inner sides of the photostats were exposed that the illegal source of the exhibits became apparent.

We have transmitted to this Court Exhibits 61-A and 61-B and they are also printed in the record (R. 2998-3001).

Lawn's contention *is not* that the *Grand Jury marks* were concealed but that the exhibits were so folded and stapled as to hide from view a *stamped marking* which revealed the exhibits to be among those which should have been returned pursuant to the orders of Judges Goddard and Palmieri.

On the inside of these exhibits, hidden from the viewer thereof, the following stamped marking appeared (R. 2999, 3001).



The brief opposing certiorari emphasizes that massive evidence "was obtained by the Government both prior and subsequent to the 1952 Grand Jury proceedings" (Br. 19). Papers so obtained prior to the Grand Jury proceedings were used before the Grand Jury by the Government and marked as Grand Jury exhibits, e.g., "G. J. Ex. —, 9 10 52 LFG."

Papers unlawfully obtained from the defendants under command of the Grand Jury were likewise marked as Grand Jury exhibits, e.g., "G. J. Ex. 2, 7 15 52, LFG" (R. 2998, 3001).

Accordingly, the source of the papers used on the trial by the prosecutor, i.e., whether papers originated from proper sources or whether they were those obtained in violation of the Fifth Amendment, was not determinable simply from the fact that a paper bore the Grand Jury's identification marking.

The stamp which ultimately betrayed the photostats as illegally procured papers, that is, the ones taken from Lawn's possession, was the stamped pink marking set forth above, showing that the check and check stub entry had been photostated by the office of the U. S. Attorney, S. D. N. Y., on July 15, 1952, the day on which Lawn appeared before the Grand Jury and produced the papers. This pink stamp did not appear on exhibits legally obtained by the Government.

During the trial itself the prosecutor and his staff had by affidavits and oral certifications blocked all inquiries demanded by the defendants to establish the origin and source of evidence used by the Government in this prosecution before the Grand Jury and on the trial. These affidavits certified to the Court and to defense counsel that no use would be or had been made on the trial of the papers which had been suppressed and which the prosecutor had twice been directed to return (R. 1943, 2083, 2948-53). The Court below approved the exercise of the discretion of the Trial Judge in accepting these certifications and refusing a hearing to the defendants (R. 2969).

It is incontrovertible in the present record that Exhibits 61A-B (R. 1021, 2998-3001) were two of the papers obtained in violation of the privilege against self-incrimination and ordered by two District Judges to be returned to Lawn, and it is incontrovertible that the prosecutor did not comply with the Judges' orders. It is further incontrovertible that the prosecutor did in fact use tainted evidence on the trial notwithstanding his recurrent certifications to the contrary. One such certification was filed at the close of the trial before sentence of two of the defendants. The opinion below does not discuss or challenge these incontrovertible facts.

Approval of use of tainted evidence.

The Court below condoned the use at the trial of the evidence unconstitutionally obtained, Exhibits 61A-B, reasoning that Lawn had suffered no harm "whatsoever" and was deemed to have waived his objection because his counsel had, generally, the opportunity of cross-examination (but not of any person having knowledge of what was produced to the Grand Jury) and had preliminarily inquired concerning the identity of the handwriting and signatures on the photostats. The Court below bottomed this ruling of harmless error on the Government's irregular offer of proof in the Court of Appeals that untainted copies of the documents were available for use. The opinion below states:

> "Further, on this appeal the government offers to prove that other copies of the same documents were in its possession months before the 1952 proceedings and that these 'untainted' copies could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel. Lawn therefore suffered no harm whatsoever and has obviously waived his objection." (R. 2971)

In thus going outside the record, the Court below was erroneously led to a further series of material errors. There were no other copies of Exhibits 61A-B in this prosecutor's possession before the 1952 proceedings or at the time of the trial. The prosecutor did not obtain the so-called "untainted" copies until January, 1956, or nearly a year after the trial and just before the argument of the appeal below. After being advised that petitioner's appellate counsel had detected the use of unconstitutional evidence, the prosecutor then set about for the first time to seek out and secure the copies referred to as "untainted" by the Court below. Seemingly these 1956 copies were obtained from a New Jersey Grand Jury's custody without petitioner's knowledge or consent (R. 2977-9).

The naked facts are that the prosecutor used Exhibits 61A-B on the trial and these were the only copies in his possession or that he had ever seen up to and at that time.

So far as this record goes, there was no other copy of Exhibits 61A-B in existence, "untainted" or otherwise. Since the original papers were tainted in 1952, the copies made in 1956 fall under the same ban as deriving from the lead or clue given in the vitiated New York proceedings.

It is further clear from the record that the tainted documents were used on the trial as a lead or clue to considerable testimony adduced by the prosecutor (R. 1018-22, 1073, 1074-5).

Suffice to say that compliance with orders to return all tainted evidence would have avoided the cumulative series of errors because the unusable papers would not have then been available to or used by the prosecutor on the trial.

SUMMARY OF ARGUMENT.

1. The prosecution's use of illegally secured evidence, in violation of the orders of two United States District Courts, deprived the petitioner of the protection afforded him by the Constitution of the United States (1) against compulsory self-incrimination and (2) to due process of law in the conduct of a criminal trial. Timely objection was taken to the illegal actions of the prosecutor on the motions to suppress and return the illegally secured evidence. This wrong to the petitioner cannot be cured by an offer of proof by the Government in the Court of Appeals to produce allegedly untainted evidence equal to the tainted evidence which was improperly admitted. Nor can the violation of petitioner's rights be condoned on the ground that further objection was not made to the use of the evidence, especially in light of (1) the constant reiteration by the prosecutor, sometimes under oath, that he was not using the tainted evidence and (2) the manner in which the stamp, which would have revealed the tainted evidence for what it was, was concealed at the time the evidence was offered in proof.

2. The misconduct of the prosecutor in the course of the trial deprived the petitioner of his rights to a fair trial. Both the due process clause and the exercise of this Court's duty to supervise the administration of criminal justice in the federal courts call for a reversal of this conviction. The introduction of illegally secured evidence after repeated assurances to the court that such evidence would not be used; the assertion in his summation that the United States vouched for the truth of the testimony of witnesses who were confessed criminals and perjurers; and charges made by the prosecutor against the petitioner in his summation which had no basis in fact, each call for the application of the *Berger* rule. These errors were so fundamental that the failure to make specific objection cannot warrant the Court's approval of this misconduct by affirming a conviction, espe-

cially in light of the weakness of the case against this petitioner. The trial court should have been alert to this misbehavior without the necessity for objection from counsel, and, in any event, objection was unnecessary since the trial court could do nothing to draw the poison which the prosecutor had injected.

3. It was a deprivation of the petitioner's constitutional rights to refuse a hearing in the course of the trial to determine whether the prosecutor was making improper use of illegally secured evidence after petitioner had once established that some such evidence was improperly offered by the prosecution and admitted by the court.

4. The petitioner could not properly be convicted of aiding and abetting the commission of a crime where the alleged principal was not found guilty and there was no evidence, absent the guilt of the alleged principal, that any such crime had been committed.

5. Section 145(b) of the Internal Revenue Code of 1939 does not make it a felony for a taxpayer who has properly disclosed his sources of income and properly reported his tax liability to conceal his assets or divert his assets to uses other than the payment of taxes.

6. The evidence against petitioner was insufficient to go to the jury or sustain the petitioner's conviction and under *Yates* v. *U. S.*, "the evidence in this record would be palpably insufficient upon a new trial."

I.

THE USE OF ILLEGALLY OBTAINED EVIDENCE, IN VIOLATION OF COURT ORDERS FOR ITS SUPPRESSION AND RETURN, WAS FUNDAMENTAL ERROR, INFRINGING THE PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION AND DEPRIVING HIM OF LIBERTY WITHOUT DUE PROCESS OF LAW.

Unconstitutional evidence—Exhibits 61A-B (R. 1021, 2998-3001), material to the prosecution, was used to convict petitioner.

This evidence had been adjudicated before the trial as illegally obtained in violation of the privilege against self-incrimination and stamped unusable in this prosecution. The illegality resulted in the dismissal of the 1952 indictments which had charged the same crimes as those tried under the later indictment. *U. S. v. Jaben*, 115 F. Supp. 674 (Goddard, *D.J.*) (R. 2866-71), untimely appeal dismissed, sub. nom. *U. S. v. Roth*, 208 F. 2d 467 (2 Cir. 1953). The prosecutor conceded that this ruling was binding on this prosecution (R. 149, 168, 171, 1348-9); "that is binding on the Court, on the Government and everybody else at this time," said the prosecutor on the trial (R. 1348-9). See *Globe v. Gibralter Ent.*, 85 F. Supp. 410, 414 (D. N. Mex. 1949).

The prosecutor was ordered before the trial to return this (and other) illegally obtained evidence, which had vitiated the first indictments. Two District Judges, Goddard, *D.J.* and Palmieri, *D.J.*, so ordered (R. 183, 2870-1, 2873). Neither order was complied with.[1]

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[1] Judge Goddard's order was made March 27, 1953. The Government appealed on May 5, 1953, 208 F. 2d, at 469. The Government meanwhile obtained a new and sealed indictment on July 23, 1953 while still in possession of the suppressed evidence (R. 31). The new indictment was kept sealed until January 26, 1954 (R. 1). However, in September 1953 the Government obtained a stay, pending its appeal, of the return of the suppressed records (R. 31). The appeal was dismissed on October

The prosecutor produced and used the suppressed documents, Exhibits 61A-B, on the trial (R. 1018-21, 1074-5) and with telling effect on the summation (R. 2598, 2603, 2604, 2605, 2606, 2607, 2627). They unquestionably influenced the jury in its verdict.

Obedience on the part of the prosecutor to either of the pre-trial Court orders to return the tainted documents to petitioner would have precluded the Government's error in using such tainted documents on the trial. The consequences of that error are to be visited on the Government, not the petitioner, since the law bars absolutely any use, whether advertent or inadvertent, of illegal proof.[2]

Rarely is a court confronted with a situation in which the prosecution has obtained a conviction based upon evidence previously held inadmissible. When the prosecution introduces evidence which has previously been adjudicated inadmissible and which the court has already ordered suppressed and returned to the accused, such use of the evidence constitutes a clear violation of the constitutional privilege and evident denial of due process of law.

> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise

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19, 1953, rehearing denied December 11, 1953, 208 F. 2d 467. The District Court on October 21, 1954 again ordered the tainted records to be returned. 16 F. R. D. 268 at 271; R. 184. The trial commenced January 11, 1955 (R. 6). The prosecutor ultimately produced Exhibits 61A-B at the trial, on January 26, 1955 (R. 1019).

[2] *Mesarosh* v. *U. S.*, 352 U. S. 1 (1956); *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115 (1956), *McDonald* v. *U. S.*, 335 U. S. 451 (1948); *Nardone* v. *U. S.*, 308 U. S. 338 (1939); *Go-Bart Importing Co.* v. *U. S.*, 282 U. S. 344 (1931); *Gouled* v. *U. S.*, 255 U. S. 298 (1921); *Amos* v. *U. S.*, 255 U. S. 313 (1921); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920); *Weeks* v. *U. S.*, 232 U S. 383 (1914); *Bram* v. *U. S.*, 168 U. S. 532 (1897); *Boyd* v. *U. S.*, 116 U. S. 616 (1886); *McGinnis* v. *U. S.*, 227 F. 2d 598 (1 Cir. 1955); *U. S.* v. *Coplon*, 185 F. 2d 629, 640 (2 Cir. 1950), Judge L. Hand.

> relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not * * * sports in our constitutional law but applications of a general principle." *Rochin* v. *California*, 342 U. S. 165, 172-73 (1952).

Such use would be plainly incompatible with the standards which this Court has established for the integrity of the administration of criminal justice in the federal courts. *McNabb* v. *U. S.*, 318 U. S. 332 (1943).

The Court of Appeals' opinion disposes of the infraction of constitutional rights on the ground that the error was harmless or waived (R. 2971). In so ruling the Court of Appeals relied on the prosecutor's offer of proof made on the appeal, that "on this appeal the government offers to prove that other copies of the same documents were in its possession months before the 1952 proceedings and that these 'untainted' copies could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel" (R. 2971).

The reference to other copies in the Government's possession is to a copy of the questioned papers which were in the possession of a Grand Jury in New Jersey. The prosecutor in this case did not have in his own possession in New York any copies of the papers other than the tainted copies. However, in January 1956 during the pendency of the appeal herein the New York prosecutor sent to New Jersey and obtained a photostat from the files of the New Jersey Grand Jury of Exhibits 61A-B (R. 2979).

The appraisal by the Court of Appeals of constitutional error as harmless and the assessment of waiver against petitioner was fundamental error of fact as well as law.

Material use of the illegal evidence.

The material impact on the petitioner of the interdicted evidence may be judged from the forceful use of it by the prosecutor, when to vindicate the oral testimony of the Government witnesses he argued to the jury "even if you have some questions about Lubben and Roth because of their background, you can't deny the documents. They do speak for themselves." (R. 2604).

> "Now here is a piece of paper, Exhibit 61A, a check signed by Frank Livorsi, the signature unquestioned, to Howard Lawn, endorsed by Howard Lawn, $15,000 check, dated November 7, 1945." (R. 2604)
>
> "He [Lawn] got a lot of money out of this. * * * he must have been doing something to get that." (R. 2598)
>
> "You heard about his $15,000 legal fee from Tavern." (R. 2598)

Parenthetically, the description of the item as a legal fee was a transgression. The sole testimony was that the $15,000 was a loan from Giglio to Lawn which had partially been repaid by Lawn (R. 1019). It was not an expense item of the partnership but a charge to the account of a partner, Giglio (R. 1021).

The tainted documents were also used as leads and clues to considerable oral testimony (R. 1018-22, 1073, 1074-5).

Cannot speculate on evidence not used.

The prosecutor's post-trial realization or contention that evidence *not used* was available, does not absolve trial use of constitutionally tainted evidence. It was an unparalleled extension of appellate power of review for the Court below to accept as proof an offer on appeal to establish that untainted proof "could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel" (R. 2971). Such reliance by the Court on a mere offer also denied to petitioner his constitutional rights to be confronted by witnesses, to cross-examine them and to refute the offer of proof made on the appeal.

This Court laid down the applicable rule in *McDonald* v. *U. S.*, *supra*, in reversing convictions obtained on tainted evidence, as at bar:

> "If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative." (335 U. S. at p. 456.)

The substitute copies of Exhibits 61A-B proffered on the argument of the appeal in the Court of Appeals, obtained in 1956 from the files of the New Jersey Grand Jury, could in no event have been used on the trial even if procured in 1955 or earlier because this prosecutor had no legal right to use material in the files of the New Jersey Grand Jury.

In *In Re April 1956 Term Grand Jury*,[3] the Court held (p. 272):

> "* * * we also hold that persons, nonmembers of the grand jury, thus having access to said records and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its work. Such persons may not in any manner use these records and documents, or any information acquired therefrom, for any other purpose, and specifically for any civil purpose, such as tax collection or otherwise."

Constitutional error is never harmless.

Constitutional error is, as matter of law, never harmless since "The proponent before the court is not the petitioner but the Constitution of the United States."[4]

The ruling below that the unconstitutional evidence could be deemed to be harmless is squarely contrary to a solid line of authority.[5]

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[3] 239 F. 2d 263 (7 Cir. 1956).

[4] *Chessman* v. *Teets*, 353 U. S. (1957).

[5] *Kremen* v. *U. S.*, 353 U. S. 346 (1957); *Helton* v. *U. S.*, 221 F. 2d 338 (5 Cir. 1955); *Wrightson* v. *U. S.*, 222 F. 2d 556, 561 (D. C. Cir.

In *U. S. v. Grunewald*,[8] the dissent of Judge Frank stated the true rule (p. 378):

> "* * * the error here consisted of an invasion of a constitutional right. Such an error cannot be deemed harmless."

There was no waiver of fundamental rights.

The Court below approved a use by the prosecutor of tainted evidence which was in violation of two court orders. The Court found waiver of petitioner's fundamental rights because: petitioner's counsel conducted a preliminary inquiry when the exhibits were offered concerning the signatures on the documents and did not renew the objections to their use, seasonably made and sustained before trial.

The posture of the prosecution at this time was that (i) seasonably in advance of trial petitioner had objected to the Government's use of Exhibits 61A-B by motions granted but not obeyed to return this evidence to petitioner; (ii) motions on the trial to investigate the use of suppressed evidence and leads and clues therefrom had been made and repeatedly denied (R. 247, 1356, 1945, 2085-6, 2136-7, 2505); (iii) unequivocal certifications repeatedly by the prosecution that none of the suppressed evidence had been or would be offered or used on trial, had been made and given (R. 82, 1943, 2083, 2948-9, 2949-53); and (iv) the telltale marks identifying the exhibits as illegally procured were physically hidden by the prosecutor's folding and stapling of the exhibits and nothing appeared reasonably to warn the petitioner of the illegality of the offer.

1955); *U. S. v. Shotwell Mfg. Co.*, 225 F. 2d 394, 406 (7 Cir. 1955), cert. granted 352 U. S. 997 (1957), and see *U. S. v. Heath*, 147 F. Supp. 877, 878 (D. Haw. 1957); *Williams v. U. S.*, 237 F. 2d 789 (D. C. Cir. 1956).

[8] 233 F. 2d 556 (2 Cir. 1956), rev'd 353 U. S. 391 (1957); and see, also, *U. S. v. Kraus*, 270 Fed. 578, 581-2 (S. D. N. Y. 1921, per Learned Hand, *D.J.*).

As matter of law and fact there was no waiver because (1) the said motions made seasonably before trial without more saved petitioner's rights; (2) the said unequivocal certifications of the prosecutor bars waiver; (3) the prosecutor had to obey the court orders and could not use the fruits of his disobedience; (4) there was no intentional relinquishment of a known right; (5) the use of tainted evidence seriously affects the fairness and integrity of prosecutions.

1. The motions seasonably made before trial for the return of the documents and the suppression thereof saved petitioner's rights against any claim of the waiver or relinquishment thereof and without need for trial objection.[7]

In *Cogen* v. *U. S.*,[8] this Court pointed out that on the trial the Court will not ordinarily permit the collateral issue of the source of otherwise admissible evidence to be tried. The way in which to preserve a defendant's rights and to prevent a waiver is to move seasonably in advance of trial as did the petitioner here for a return of tainted documents. This Court appositely held (p. 223):

> "Hence, a defendant will, ordinarily, be held to have waived the objection to the manner in which evidence has been obtained unless he presents the matter for the consideration of the court seasonably in advance of trial; and he does this commonly by a motion made in the cause for return of the property and for suppression of the evidence."
>
> • • • • •
>
> "The disposition made of the motion will necessarily determine the conduct of the trial and may vitally affect the result."

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[7] *Cogen* v. *U. S.*, 278 U. S. 221 (1929); *Waldron* v. *U. S.*, 219 F. 2d 37, 41 (D. C. Cir. 1955); *Blok* v. *U. S.*, 70 A. 2d 55, 57 (Mun. Ct. App. D. C. 1949), aff'd 188 F. 2d 1019 (D. C. Cir. 1951); *U S.* v. *Wheeler*, 149 F. Supp. 445, 447 (W. D. Pa. 1957).

[8] *Supra*, ftn. 7.

Once a court has disposed of a point concerning the admission or exclusion of evidence including its tainted character, litigants may—indeed must—proceed to try the case accordingly.

In *Waldron* v. *U. S.*,[9] the government contended as at bar, that there was a waiver by failure to object when the evidence was offered. The Court held (p. 41):

> "The movant has a right to renew his point; it would be safer and more skillful to interpose an objection when the evidence is offered; but we think he is not required to do so. He does not waive it and is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case accordingly."
>
> • • • • •
>
> "It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during a trial. • • • Once the court has disposed of a point concerning the admission or exclusion of evidence, litigants must proceed to try the case accordingly."

In *U. S.* v. *Wheeler*,[10] the Court went so far as to forbid a renewal of the objection on the trial and it held (p. 447):

> "I advert to the rule of law that a ruling on motion to suppress evidence becomes the controlling rule in the case as does a ruling made during trial. The objection may not be renewed at the trial."
>
> • • • • •
>
> "The defendant is saved harmless in view of the fact that he is not required to renew his motion or press his objection, since he is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case."

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[9] 219 F. 2d 37 (D. C. Cir. 1955).

[10] 149 F. Supp. 445 (W. D. Pa. 1957).

2. Time after time the prosecution, on oath and in the most emphatic terms, asserted its scrupulous compliance with the order, accepting it as laying down the conditions under which the trial was to be held. To quote but one of many similar statements, the prosecutor said:

> "I would like to state again, if your Honor please, positively, finally, and affirmatively—I will do it under oath or any way that I possibly can—that I am positive that there has been nothing in this case in the trial or before the grand jury that in any way comes from those partnership records which Judge Goddard found to have been illegally obtained. I am certain of that. I have made every possible effort, inquiry, to determine that. I have submitted affidavits twice to this Court, not only from myself, but from each person who worked on the case." (R. 2083)

Even as late as the sentencing date the prosecutor averred, along with all of his associates, that no tainted or proscribed evidence was or had been used on the trial (R. 2948-53). Such claim bars any contention of waiver.

In *U. S.* v. *Costello*,[11] the Court stated the rule of law and impeccable logic (p. 896):

> "In addition, the Assistant United States Attorney's adamant insistence to the very last moment of the trial that his evidence did not stem from wire taps is hardly consistent with his claim that the defendant should be held to have waived any objection to them."

3. The Court below in assessing waiver against petitioner in effect says that the District Court orders need only have been obeyed if on the trial the petitioner had policed the prosecutor's duty of obedience to judicial orders. This is clearly not the law. In *Rea* v. *U. S.*,[12] this Court laid it down as the law of the land:

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[11] 145 F. Supp. 892 (S. D. N. Y. 1956), rev'd o. g. — F. 2d — (2 Cir. 1957).

[12] 350 U. S. 214 (1956). Government officials likewise must obey court orders. *Land* v. *Dollar*, 190 F. 2d 366 (D. C. Cir. 1951), cert. dism. 344 U. S. 806 (1952); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

> "The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."

The device of photostating before returning the tainted evidence cannot relieve the prosecutor from obedience to court orders. *People* v. *Berger*, 44 Cal. 2d 459, 462 (1955).

4. There was here no intentional relinquishment of a known right. The unconstitutional use was not apparent to the petitioner at the time; the physical form of the evidence concealed telltale marks which identify it as illegally procured. These telltale identifying marks on the inner side of the photostatic exhibits were hidden from view because the inner side had been stapled or folded over. The stamps showed that the photostats were those illegally exacted and made on July 15, 1952, by the United States Attorney under the coercion of the Grand Jury subpoena. These stamps could be exposed only by removal of the stapling or unfolding the photostats.

There was no occasion on the trial to open the folds and remove the staples, folded or placed there by the prosecutor, to examine what ostensibly would only be the blank insides of the photostats. Thus, the petitioner was not on notice that the exhibits were those ruled tainted by Judge Goddard.

The preliminary questioning to which the Court below referred prior to the introduction of the tainted evidence was conducted in the light of the vouchers from the prosecutor that no tainted evidence had been or would be used and was limited by the Court's denial of a hearing on the use of tainted evidence. The witness (Roth), who was the one preliminarily questioned, did not supply the exhibits to the 1952

Grand Jury and perforce could not testify to the source to which the prosecutor had turned to obtain the papers which he was then offering in evidence. He was examined merely to identify the handwriting and the signatures (R. 1022).

In addition petitioner throughout the trial was demanding a hearing so that he could ascertain what tainted evidence had been used either directly or as leads and clues. The lack of specific objection at the precise moment when the photostats were offered in evidence was not to be taken as a conscious relinquishment of the repeated assertions of unconstitutional procedure on the prosecutor's part and misuse of illegal evidence.[13]

As in *Emspak*, to find waiver here "would be to violate this Court's own oft-repeated admonition that the courts must indulge every reasonable presumption against waiver of fundamental constitutional rights."[14]

The prosecutor's certifications and the folding and stapling of the photostats concealed the prosecutor's course. As there was no warning of the prosecutor's course, so also there was no consent or waiver. There was not here "an intentional relinquishment or abandonment of a known right or privilege."[15]

5. Any claim of waiver poses inescapable dilemmas for the government.

The Court below and the government perforce have taken the erroneous view that government agents need not obey court orders if defendant's counsel does not adequately police the orders.

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[13] *Emspak* v. *U. S.*, 349 U. S. 190, 195, 198 (1955); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938).

[14] *Emspak* v. *U. S.*, cit. *supra*, n. 13, at p. 198.

[15] *Johnson* v. *Zerbst*, 304 U. S. 458, 463 (1938); see, also, *Glasser* v. *U. S.*, 315 U. S. 60, 70 (1942).

But more than that. If the external markings on these exhibits were sufficient to warn petitioner of his "known right," then the warning was even clearer to the prosecutor that he was using tainted evidence and in consequence the prosecutor knowingly used illegally obtained evidence in violation of two court orders, and his solemn oath to the contrary was consciously incorrect.

Indeed, the prosecutor in his brief to the Court of Appeals makes an explicit statement which comes very close to an admission that the suppressed documents were knowingly used (Br. p. 64):

> "• • • the documents bore grand jury markings on their face, making their source as clear to Lawn and his counsel as to the prosecutor."

The prosecution repeatedly and solemnly gave lulling assurances of the certainty that no suppressed documents were being used in any way. We are not here primarily concerned with whether the prosecution knowingly used the suppressed documents. Fundamental error was committed even if the use was inadvertant. We emphasize, however, that every time the prosecution charges the petitioner with intelligent waiver of his privilege, it convicts itself, *a fortiori*, of wilfull violation of the petitioner's rights, wilfull disobedience of two court orders, and false swearing.

Convictions so obtained are subject to collateral attack whether or not there is an objection on the trial.[16]

But irrespective of lack of trial objection, this is a case where there can be no waiver because "The dignity of the United States Government will not permit the conviction of any person on tainted testimony."[17]

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[16] *Mooney* v. *Holohan*, 294 U. S. 103 (1935).

[17] *Mesarosh* v. *U. S.*, 352 U. S. 1 (1956) at p. 9 (majority) semble at p. 25 (dissent); see, also, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124 (1956); and see *U. S.* v.

The use by the prosecutor of tainted and proscribed documents is a use which would "seriously affect the fairness, integrity or public reputation of judicial proceedings."[18]

II.

THE PROSECUTOR'S CONDUCT DEPRIVED PETITIONER OF A FAIR TRIAL.

Due process was not afforded to petitioner Lawn here. The trial did not meet federal standards for a criminal prosecution.

This Court has, from time to time, admonished prosecuting counsel that it is their duty to see that justice is done and not to secure convictions. *Berger* v. *United States*, 295 U. S. 78 (1935); *Viereck* v. *United States*, 318 U. S. 236, 248 (1943); *Jencks* v. *United States*, 353 U. S. 657 (1957). It is this fundamental precept of Anglo-American Law which the prosecuting attorney in the instant case has so flagrantly violated.[19]

Gordon, 236 F. 2d 916 (2 Cir. 1956), where the Court said: "American prosecutors must learn to adjust themselves to these obstacles. The purpose of the Bill of Rights was, as Madison declared, 'to oblige the government to control itself'." (p. 920).

[18] *U. S.* v. *Atkinson*, 297 U. S. 157, 160 (1936); semble, *Clyatt* v. *U. S.*, 197 U. S. 207, 221, 222 (1905); *New York Central R.R.* v. *Johnson*, 279 U. S. 310, 318-19 (1929); *Brasfield* v. *U. S.*, 272 U. S. 448, 450 (1926), and cases there cited. The Solicitor General's brief opposing certiorari argued that production to the 1952 Grand Jury by petitioner of Exhibits 61A-B pursuant to its subpoena constituted a waiver for purposes of trial of constitutional rights (Br. 24). The authorities repudiate this. *In re Neff*, 206 F. 2d 149, 152 (3 Cir. 1953); *Poretto* v. *U. S.*, 196 F. 2d 392, 394 (5 Cir. 1956); *Ballantyne* v. *U. S.*, 237 F. 2d 657, 665 (5 Cir. 1956). Such production is under coercion and duress, *Grunewald* v. *U. S.*, 353 U. S. 391 (1957), and cannot bottom a claimed waiver. *Whitley* v. *U. S.*, 237 F. 2d 787 (D. C. Cir. 1956); *Judd* v. *U. S.*, 190 F. 2d 649, 651 (D. C. Cir. 1951).

[19] The English courts call for reversal of conviction when the prosecutor has overstepped the boundaries of fair play. In *Rex* v. *Sugarman*,

The witnesses on whom the Government's case rested were Roth and Lubben. These men admittedly were perjurers, black marketeers, and were admittedly guilty of innumerable crimes. Their credibility had been severely shaken by proof of their criminal predilections and their almost habitual perjury (R. 2588-9).

Roth had pleaded guilty to filing false financial statements with the R. F. C. (R. 1251). He was not yet under sentence on that charge because his lawyers had successfully persuaded the court to leave him free to "cooperate" with the prosecution in the case at bar (R. 1274-85) a fact making his testimony suspect. Cf. *Ilford* v. *United States*, 282 U. S. 687, 693 (1931). He had pleaded guilty to all the charges in the indictment in the case involving these defendants, for which he was not yet sentenced (R. 981). He ultimately received a suspended sentence at the recommendation of the United States Attorney (R. 8). He admitted lying on the stand in this case (R. 1261-2), before the grand jury (R. 1270, 1295), and before the Kefauver Committee (R. 1326). He confessed to having committed perjury in a New Jersey receivership case (R. 1294). He filed false income tax re-

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29 Cr. App. Rep. 109, 114-15 (1935), Lord Chief Justice Hewart said, in a case in which prosecuting counsel had suggested, as in the case at bar (see p. 39, *infra*), that the defendant was guilty of crimes other than those with which he was charged:

> "It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. By so doing he can only weaken his case and may prevent a verdict which ought otherwise to be obtained. * * *
>
> "The Court has no alternative in this case, whatever its merits or demerits otherwise may be, but to allow the appeal and quash the conviction."

turns for himself in 1944, 1945, 1946 (R. 1237), and 1948 (R. 1257), as well as for two clients (R. 1094). And, with all the casualness of a totally amoral person, he admitted bribing O. P. A. officials (R. 1029). Lubben was no different. He blandly admitted over and over again that in various proceedings and while under oath he had perjured himself. "I lied," he frequently said (R. 378, 433, 435, 437, 439, 450, 472, 473, 672, 673, 675, 686).

Lawn's unblemished character (R. 947) and his record by themselves were more than enough to counterbalance the uncorroborated government witnesses, Roth, who was "cooperating" to save himself, and Lubben, a like character.

To offset Lawn's weight the prosecutor became an unsworn witness not subject to cross-examination; he threw onto the scales the prestige of his own person and that of the whole United States Attorney's office. He told the jury

> "I vouch for Lubben. The Government put Lubben on the stand because they thought that Lubben could be vouched for.
>
> "I vouch for Roth also * * *.
>
> "I vouch for them and I will explain precisely why I do in just a moment, but I vouch for them. When I say 'I,' I am referring to the District Attorney's office, and I merely represent them. We vouch for them because we think they are telling the truth." (R. 2587-8)

And again, about Roth:

> "* * * I think he told the truth." (R. 2592)

There was no doubt that the Government felt it necessary to reinforce the testimony of such persons if the jury were to bring in a verdict on the basis of their tales. It could not bolster their story by record evidence. The prosecutor, therefore, resorted to his own evidence by way of "vouching" for them as the only additional support available to avoid the collapse of his case.

This self-evident transgression needs no extended argument to demonstrate its deviation from minimum standards for a federal prosecution. Like conduct has been appropriately described as "a weighted foul blow by the District Attorney."[20]

This demonstrated anxiety to convict rather than to permit justice to be determined on the proofs did not conform to the standards for prosecution mandated by this Court.[21]

It is not within the competence of a prosecutor to prejudice a defendant by personal guaranties of guilt, insinuating personal knowledge to the jury or like misbehavior, as did the prosecutor at bar.[22]

The fundamentals of a fair trial preclude resort to the methods used here even in a case in which guilt may be convincing.

The New York Court of Appeals, in complete accord with this Court, has said in *People* v. *Savvides* (p. 558):[23]

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[20] *People* v. *Nicoll*, 3 App. Div. 2d (N. Y.) 64, 79 (4th Dept. 1956).

[21] *Berger* v. *U. S.*, 295 U. S. 78, 88-9 (1935); *Nalli* v. *U. S.*, 240 F. 2d 707, 710 (5 Cir. 1957); *Steele* v. *U. S.*, 222 F. 2d 628, 631 (5 Cir. 1955); *U. S.* v. *Murphy*, 222 F. 2d 698, 700 (2 Cir. 1955). Surely this Court and the New York courts are in full accord on the applicable standards of prosecutions. The New York courts invariably strike down convictions when the prosecutor undertakes to vouch for his witnesses or otherwise misconducts himself. *People* v. *Lotello*, 1 N. Y. 2d 436, 439 (1956); *People* v. *Savvides*, 1 N. Y. 2d 554 (1956); *People* v. *Tassiello*, 300 N. Y. [illegible] 430 (1950); *People* v. *Taylor*, 2 App. Div. 2d (N. Y.) 977, c. 17 (2d Jt. pt. 1956); *People* v. *Reimann*, 266 App. Div. (N. Y.) 505 (1st Dept. 1943); and see *People* v. *Ochs*, 3 N. Y. 2d 54 (1957).

[22] *Berger* v. *U. S.*, 295 U. S. 78 (1935), and see cases cited by this Court on p. 89; *Boyd* v. *U. S.*, 142 U. S. 450, 459 (1892); *Snipes* v. *U. S.*, 230 F. 2d 165 (6 Cir. 1956); *MacDonald* v. *U. S.*, 264 Fed. 733 (1 Cir. 1920); *Miller* v. *Territory of Oklahoma*, 149 Fed. 330, 339 (8 Cir. 1906); *People* v. *Mleczko*, 298 N. Y. 153 (1948); *People* v. *Minkowitz*, 220 N. Y. 399 (1917); *People* v. *Wolf*, 183 N. Y. 464 (1906); *People* v. *Swanson*, 278 App. Div. (N. Y.) 846, c. 2 (2d Dept. 1951); *People* v. *Maestry*, 167 App. Div. (N. Y.) 266 (1st Dept. 1915).

[23] 1 N. Y. 2d 554 (1956); and see, also, *McClure* v. *State*, 95 Tex. Crim. R. 53 (1923); *cf. Chessman* v. *Teets*, 353 U. S. [illegible] (1957).

> "Convincing though proof of guilt may be, * * * we could here affirm 'only if we were to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt.' [citation omitted] We were not in *Mleczko*, and we are not now, prepared to announce such a doctrine."

The minimum to offset the transgression was for the Judge to have charged, as requested, that in determining conflicts in the testimony, government witnesses are not entitled to any more credence than other witnesses (R. 2762). This request was denied and exception taken (R. 2762) thereby underscoring the prosecutor's summation.

The violation in this case of standards of a fair trial does not rest merely with this aspect of the summation albeit this was enough irrevocably to taint the conviction.

The prosecutor over-zealously went further. His thesis on summation was not that the jury should convict Lawn because of record proof of the crimes charged but because of the personal characteristics which the prosecutor chose to attribute to Lawn. It was not tax evasion conduct which the prosecutor told the jury it should stamp as wrong.

The prosecutor told the jury that the kind of conduct which it was called upon to approve or disapprove was the conduct of people like the defendants because Roth had allegedly threatened to kill Lubben (R. 2673-4)[24] and presumably the petitioner was to be placed in the same category because of his business association with a Roth.

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[24] The prosecutor told the jury after reciting Roth's threat to kill: "* * * these are the kind of human beings that must in some way be prevented from continuing this kind of conduct; that you must, not only for the good of the community, as far as they are concerned, but for the good of other persons, to prevent it from happening again, tell the whole community, and you are the voice now of the community, that this kind of conduct is wrong." (R. 2673-4) Roth was not on trial, having pleaded guilty.

This sought to influence the action of the jury by reference to a presumed public clamor. This falls short of due process to defendants.[25]

The prosecutor argued to the jury that Lawn was guilty of collateral crimes not material or established by the evidence, crimes with which he had never even been charged and which had no reference whatsoever to the crimes being tried. Because his own witnesses had indulged admittedly in evasion of personal income taxes, fixing, and bribery, the prosecutor thought it desirable to accuse Lawn of the same illegal acts, Lawn's alleged personal tax evasion, fixing, bribery, physical threats (R. 2600-8, R. 2674) although the prosecutor could not support his claims. "The heart of this case is fixing, it is bribery" (R. 2587). The prosecutor admitted that part at least of such charges were "interpolated" (R. 2607-8).

Convictions so obtained may not stand.[26]

During the trial the same prosecutor proclaimed before the jury the probability in his opinion that Lawn would intimidate or tamper with the witness Roth (R. 1333-4); and that Lawn would improperly approach another Government witness (R. 1591). Justification was lacking for such accusations placed before the jury. At all events this was highly prejudicial conduct of the prosecutor.[27]

The prosecutor set himself up as a judge; he proclaimed to the jury that his witness Lubben was properly conducting himself.[28]

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[25] *Boyd* v. *U. S.*, 142 U. S. 450, 459 (1892); *Benham* v. *U. S.*, 215 F. 2d 472, 474 (5 Cir. 1954); *People* v. *Esposito*, 224 N. Y. 370, 376 (1918); *People* v. *Fielding*, 158 N. Y. 542 (1899).

[26] *Snipes* v. *U. S.*, 230 F. 2d 165 (6 Cir. 1956); *Coulston* v. *U. S.*, 51 F. 2d 178 (10 Cir. 1931); *Pierce* v. *U. S.*, 86 F. 2d 949 (6 Cir. 1936); *cf. MacDonald* v. *U. S.*, 264 Fed. 733 (1 Cir. 1920); and see *People* v. *Brown*, 2 App. Div. 2d (N. Y.) 202 (4th Dept. 1956).

[27] *People* v. *Nicoll*, 3 App. Div. 2d (N. Y.) 64, 78 (4th Dept. 1956).

[28] See especially R. 429, 467, 687. See also R. 415, 416, 419, 426, 427.

Lubben simply refused to answer questions on cross-examination, his answers were utterly unresponsive, and he constantly interjected prejudicial comment which had no connection with the questions he was answering.[29]

The Judge did not bring this witness into line, although so requested.[30] This too was highly prejudicial and requires reversal.[31]

The prosecutor invaded Lawn's constitutional privilege when, without any possible excuse, he dramatically informed the jury that defendants had not produced the partnership books. "Mr. Wessel: I would like to see the Tavern and Eatsum books" (R. 2409). Motion for a mistrial was denied without any corrective action (R. 2410). This ruling was pejudicial error.[32]

A conviction secured by the illegal means used in this case must be reversed.

435, 438, 458-9, 571-3, 574-5, 576, 578, 580-1, 586, 630, 673, 872, 880, 885. "Mr. Wessel: I believe the answer is called for by the antagonistic comments and the attitude counsel is assuming with the witness" (R. 467). The answer referred to by the prosecutor was utterly unresponsive and highly damaging.

[29] R. 415, 425, 429, 432, 435, 463, 467, 478, 480, 481, 513, 539-40, 544, 571-3, 574, 575-6, 578, 580-1, 659, 665, 673, 675, 686, 863, 867, 868, 869-70, 871, 872, 873, 874, 877, 878, 881, 882-3, 885, 886, 888, 890, 893-4.

[30] R. 415, 429, 432, 481, 564, 571-3, 580-1, 665, 675, 687, 880, 883, 894.

[31] *Nalls* v. *U. S.*, 240 F. 2d 707, 711 (5 Cir. 1957); *Brown* v. *U. S.*, 202 F. 2d 474, 476 (5 Cir. 1953). Even if the prosecutor did not cue or encourage Lubben's unresponsive and prejudicial interjections, reversal is mandated. *Nalls* v. *U. S.*; *Brown* v. *U. S.*, cit. *supra*. "True, there is nothing to indicate and no reason to believe that the government intended or expected the witness to answer as he did. At the same time, we are not able to discern how innocence on the part of government counsel mitigates the damaging effect which the statement was calculated to have on the minds of the jury and the rights of the defendant." *U. S.* v. *Meagley*, 239 F. 2d 637 (7 Cir. 1957) at p. 638.

[32] *McKnight* v. *U. S.*, 115 Fed. 972 (6 Cir. 1902); *People* v. *Minkowitz*, 220 N. Y. 399 (1917).

The reasons are threefold. First, because the defendant has been found guilty on the basis of "evidence" which was not properly before the court and which could not but have affected the judgment of the jury. Second, because reversal of the conviction is the only real sanction against continued conduct of the same kind by federal officials. Third, because the federal courts can not lend themselves to participation in such unbecoming conduct. As Mr. Justice Traynor wrote in the opinion in which the California Supreme Court adopted the rule of exclusion with regard to evidence obtained by unreasonable search and seizure:

> "It is morally incongruous for the state to flout constitutional rights and at the same time demand that the citizens observe the law. The end that the state seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies unlawful acts by any member of the public. Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' (See Allen, The Wolf Case, 45 Ill. L. Rev. 1, 20.)" *People* v. *Cahan*, 44 Cal. 2d 434, 446 (1955).

Or, as put by the House of Lords:

> "If in any case the evidence against a prisoner (other than that which is inadmissible) is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed." *Maxwell* v. *Director*, 24 Cr. App. Rep. 152, 176 (1934).

This plain and egregious error requires reversal irrespective of trial objection. Time and again, this Court has reversed for plain error though no objection was made by counsel.

> "* * * [A] trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy . . . of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice * * *. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. * * *" *New York Central R.R. v. Johnson*, 279 U. S. 310, 318-19 (1929).

How much more demanding than the *Johnson* case is this case which involves not merely a contest over money between private individuals but one between the United States and its citizens with the liberty of the defendants at stake. As this Court said in *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936):

> "In exceptional cases, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

Misconduct of prosecuting attorneys, as at bar, has been recognized as seriously affecting the fairness, integrity and reputation of judicial proceedings calling for reversal regardless of objection.[33]

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[33] See, e.g., *Pierce* v. *U. S.*, 86 F. 2d 949 (6 Cir. 1936); *Benham* v. *U. S.*, 215 F. 2d 472 (5 Cir. 1954); *Snipes* v. *U. S.*, 230 F. 2d 165 (6 Cir. 1956); cf. *Robinson* v. *Pennsylvania R.R.*, 214 F. 2d 798 (3 Cir. 1954).

Once the prejudicial remarks of counsel had been made, once he had "vouched" for the truth of his witnesses' testimony, there was no cure available to the trial court. "In spite of the very clear admonition which the trial judge gave the jury we think that these remarks are not the kind that jurors could 'put out of their minds' simply by being told to do so. There must, therefore, be a reversal."[34]

Where, as here, the prosecution case against Lawn "may properly be characterized as weak—depending, as it did, upon the testimony of [Lubben] [Roth], an accomplice with a long criminal record" (295 U. S. at 89), this Court cannot properly affirm a conviction where the prosecutor has abused his office so grossly. Certainly this Court cannot say that the jury would have respected Lubben's and Roth's testimony without the support afforded by the "voucher" of the prosecutor and the "District Attorney's office", his reference to "other crimes" of the defendants, and his gratuitous presentation of non-record "evidence" in his summation. And, certainly, the Court cannot sanction this conduct in light of the prosecutor's certification that he was not making use of evidence which he had been forbidden to use by two United States District judges, when in fact he had done so.

To countenance such oppressive practices as at bar, even at their mildest form, is to open the door to wholesale decay of the constitutional rights of citizens, for such decay usually commences by "silent approaches and slight deviations from legal modes of procedure."[35]

It may be that the lapse of 22 years since this Court decided *Berger* has dulled memories of the standards of federal prose-

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[34] *U. S. v. Georga*, 210 F. 2d 49, 57 (3 Cir. 1954); *cf. U. S. v. Lotz*, 177 F. 2d 827, 829-30 (7 Cir. 1949); *Brown v. Walter*, 62 F. 2d 793 (2 Cir. 1933).

[35] *Boyd v. U. S.*, 116 U. S. 616, 635 (1886).

cution mandated thereby. Current prosecutors as officers of the United States and members of the Bar are bound to know and apply the wholesome doctrine of *Berger*.[36]

III.

PETITIONER WAS DENIED DUE PROCESS BY THE REFUSAL OF A HEARING ON THE USES OF ILLEGAL EVIDENCE AND LEADS AND CLUES THEREFROM.

On the ground of lack of foundation, the Trial Judge denied to petitioner a hearing or the right to cross-examine Government witnesses on the uses made by the prosecutor on the trial of evidence unconstitutionally and illegally obtained (e.g., R. 1354-6, 1943-5, 2076-88, 2136). This is further ground for reversal of petitioner's conviction.

These rulings were denial of due process because the record incontrovertibly showed that tainted evidence was used by the prosecutor to convict Lawn.

The foundation for the requested hearing was properly laid.

The necessary foundation for the requested hearing was adequately established by the proof in the record of the use on the trial of the product of unconstitutional or illegal conduct.[37]

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[36] The Government has intimated that all bars are down for prosecutors when a defendant's attorney strikes hard at Government witnesses who are admittedly perjurers and criminals. The record was plain that Roth and Lubben were perjurers and criminals; defendants' counsel simply recited the record when he called them such in his summation. A statement of record proof by Lawn's counsel does not provide an opportunity for the prosecutor to make himself an unsworn witness and to bridge the gaps in his proof by personal vouchers.

[37] *Nardone* v. *U. S.*, 308 U. S. 338 (1939).

Admittedly, the prosecutor had proceeded illegally[38] and the adjudication thereof was "the law of this case" by which "the Government is bound"; Judge Goddard's finding of illegal procedure "is binding on the Court, on the Government and everybody else at this time," said the prosecutor (R. 149, 168, 171, 1348-9).

Grand Jury Exhibits 2 and 4, dated July 15, 1952, and all other partnership and personal records obtained from Lawn and his co-defendants by the 1952 Grand Jury, were fruits of the adjudicated illegality and their use by the prosecutor accordingly proscribed.[39]

The prosecutor used illegal evidence and its leads and clues.

1. Grand Jury Exhibits 2 and 4 were introduced in evidence (Trial Exhibits 61A and 61B) by the prosecutor (R. 1021, 2998-3001).

Exhibits 61A and 61B were used as leads and clues to a large amount of oral testimony (R. 1018-21, 1074-5).

2. On the trial, Mr. Present, a Government agent, admitted that he had examined and audited various of the tainted books and records, prior to the return thereof to the defendants (R. 1943-4). Lawn was not permitted by the Judge to cross-examine Mr. Present as to uses made on the trial of the leads and clues derived by Mr. Present from those tainted books, although the prosecutor was willing that Lawn should cross-examine Mr. Present (R. 1943-5).

3. It also appears that the prosecutor used leads and clues on the trial derived from testimony elicited from Lawn and his co-defendants by the Kefauver Committee. The prosecutor so conceded in his brief to the Court of Appeals.

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[38] *U. S. v. Lawn*, 115 F. Supp. 674 (S. D. N. Y. 1953), app. dism. *U. S. v. Roth*, 208 F. 2d 467 (2 Cir. 1953).

[39] *Ibid.*, ftn. 38.

When charged in the Court of Appeals with proving Count 7 by use of unconstitutional leads and clues, the prosecutor claimed (Br. 64) that his source was "the Kefauver Senate Crime Investigating Committee which got all its leads from treasury agents." However, leads and clues from the Kefauver Committee were also proscribed.[40]

Denial of the requested hearings was constitutional error.

The Trial Judge was bound on the record in this case to grant the requested hearing.

In *Nardone* v. *U. S.*,[41] this Court ruled:

> "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping [constitutionally tainted evidence in the case at bar] was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree." (p. 341)

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[40] 52 Stat. 943 (1938), 18 U. S. C. § 3486, which was applicable in 1950 when the defendants testified before the Kefauver Committee, provided: "No testimony given by a witness before either House, or before any committee of either House, * * * shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony." The amendment of this section in 1954 to make it an immunity statute did not free the prosecutor to use the Kefauver testimony on the trial in 1955. *Adams* v. *Maryland*, 347 U. S. 179 (1954): "Congress left the Act on the books, and it was there when this petitioner testified" (p. 184). The Government in *U. S.* v. *Olson*, 134 F. Supp. 481, 482-3 (E. D. N. Y. 1955), conceded, after the statute was amended in 1954, that testimony given before the King Committee could neither be used before the Grand Jury to indict nor the trial jury to convict (p. 483). Neither the testimony itself nor leads nor clues therefrom could legally be used by the prosecutor. *Nardone* v. *U. S.*, 308 U. S. 338 (1939).

[41] 308 U. S. 338 (1939).

This Court has uniformly held that the denial of a properly requested hearing is fundamental error.[42]

In *U. S. v. Coplon*,[43] Judge Learned Hand held (p. 638):

> "* * * In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did 'lead,' or might have 'led,' to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens."

The Government may suggest that it was unaware that it had transgressed and that defense counsel did not alert the Judge to the error. However, the consequences of such error fall only on the offending party; whether the error derives from inadvertence or bad faith is immaterial.[44]

It was constitutional error to sustain the prosecutor's affidavits.

Lawn was foreclosed on his application for a hearing, on affidavits of the prosecutor and his associates.

It was fundamental error to sustain the conclusiveness of such affidavits.[45] Like affidavits were found contrary to

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[42] *Gouled* v. *U. S.*, 255 U. S. 298 (1921); *Nardone* v. *U. S.*, 308 U. S. 338.

[43] 185 F. 2d 629 (2 Cir. 1950).

[44] *U. S.* v. *Meagley*, 239 F. 2d 637 (7 Cir. 1957); cf. *Petition of Provoo*, 17 F. R. D. 183, 202 (D. Md.), aff'd 350 U. S. 857 (1955).

[45] *Herman* v. *Claudy*, 350 U. S. 116 (1956); *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *U. S.* v. *Lipschitz*, 117 F. Supp. 466 (E. D. N. Y. 1954); *Buono* v. *U. S.*, 126 F. Supp. 644 (S. D. N. Y. 1955).

fact when the 1952 indictments were dismissed by Judge Goddard; and Trial Exhibits 61A and 61B make it plain of record that the trial affidavits were not factually correct either.

As this Court pointed out in *Chessman* v. *Teets*,[18] at p. :

> "Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. * * * We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

IV.

THE DISMISSAL OF THE INDICTMENT AS TO ABC MANDATED ACQUITTAL OF PETITIONER ON COUNT 9.

Lawn was charged in Count 9 with aiding and abetting the American Brands Corporation (ABC) to evade payment of its taxes for the tax year 1946 (R. 15-16).

It is plain that only ABC could evade the payment of its taxes, that only ABC owed a duty to pay its taxes, and that Lawn was under no duty to compel ABC to pay or to pay on behalf of ABC its taxes.

ABC was not charged as a defendant in Count 9.

However, ABC was charged as a defendant in Count 10 (R. 16). In Count 10 ABC was charged with, *inter alia*, conspiring to evade the payment of the very taxes involved in Count 9 (R. 16-17).

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[18] 353 U. S. — (1957).

The charging language of Count 10 was identical with the charging language of Count 9 (cf. Count 9 with paragraphs 1, 2, 6 and 7 of Count 10). In short, ABC was charged in Count 10 with all of the elements necessary to make up the substantive crime charged in Count 9 (R. 16-17).

Accordingly, Count 10 encompassed Count 9 and a conviction of, acquittal of, or dismissal as to, ABC on Count 10 is equivalent in law to a conviction, acquittal, or dismissal as to Count 9. Necessarily implicit in each of such events is a determination of guilt or innocence, as the case may be, of the act which petitioner is charged with having aided.

In *U. S. v. Zeuli*,[47] the Court (per L. Hand, C.J.) held (p. 847):

> "• • • the conspiracy count itself—if one includes the fourth overt act—alleged all the facts which made up the substantive crime. As mere matter of pleading, the characterization of the criminal liability arising from those facts is of no importance, provided the accused is advised of what he has to meet • • •."

The indictment as to ABC was dismissed (R. 2747). The dismissal of Count 10 as to ABC is in law, under the foregoing authority, equivalent to a dismissal of Count 9 as to ABC; it establishes as a fact adjudicated that ABC did not commit the crime of evading the payment of its own taxes.[48] As matter of law, petitioner could not therefore have aided ABC to commit this crime and Count 9 should have been dismissed.[49]

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[47] 137 F. 2d 845 (3 Cir. 1943).

[48] *Yawn* v. *U. S.*, 244 F. 2d 235 (5 Cir. 1957).

[49] *Legatos* v. *U. S.*, 222 F. 2d 678, 688 (9 Cir. 1955); *U. S. v. Titus*, 210 F. 2d 210, 214-5 (2 Cir. 1954); *U. S. v. Klock*, 210 F. 2d 217, 220 (2 Cir. 1954); *Morgan* v. *U. S.*, 159 F. 2d 85, 87 (10 Cir. 1947); see *Farrell* v. *U. S.*, 181 F. 2d 981, 985 (9 Cir.), cert. den. 340 U. S. 891 (1950); *Beauchamp* v. *U. S.*, 154 F. 2d 413, 416 (6 Cir. 1946).

V.

PETITIONER WAS ENTITLED TO ACQUITTAL ON ALL COUNTS. THE GOVERNMENT'S THEORY OF PLEADING AND PROOF DID NOT CHARGE OR ESTABLISH A CRIME UNDER I.R.C., § 145(b).

Petitioner was charged with aiding others to violate the I.R.C. of 1939, § 145(b) (Counts 7 and 9) (R. 15-6). Lawn was not charged as an offending taxpayer.

The theory of the charge, even if established (which it was not), does not spell out a felony under I.R.C., § 145(b).

The opposing contentions.

The Government's theory of pleading and proof against the petitioner was that the taxpayers had concealed their means to pay their taxes or had misused their capital so they could not pay taxes, and these were criminal acts. The Government stipulated that so far as concerns its case against petitioner, the taxpayers had properly disclosed and reported their sources of income and tax debts due to the United States (R. 2715-8).

The petitioner contends that absent a tax deficiency, the taxpayer's non-payment of a tax debt, properly reported and disclosed, is not a felony, irrespective of whether the taxpayer conceals or loses or diverts his assets elsewhere than to payment of his fully and properly admitted debt.

The felony statute strikes at tax deficiency not uncollectibility of debts.

It is plain beyond doubt that non-collection and not deficiency in tax is the legal charge in this case.

The basis of the conviction.

The Court charged the jury:

> "Here [Count 7], however, the Government says i[t] is not charging him [Gigno] with falsely reportin[g]

taxes. It says, taking their taxes as reported, they evaded payment of those taxes by concealing assets, to make it impossible to collect those taxes." (R. 2715)

"Again [Count 9] the same statute is involved, and the same general question is involved: the evasion of the payment of a tax due from the American Brands Corporation, not by filing a false return, but taking the return as filed as correct by concealing, diverting the assets of that corporation so that the tax could not be collected." (R. 2717)

The prosecutor similarly explained to the jury the theory of Counts 7 and 9:

"What happened to that $286,000 that he [Giglio] said he owed. Count 7 shows that he paid peanuts for that. He paid his estimated taxes in advance, about $8,000, but of the $286,000 that he said he owed, he paid nothing, except for that estimated amount of about $8,000, and when the Government, when he knew the Government was coming around, he hid his assets, concealed them, got rid of everything he had so nobody would find it." (R. 2895)

"The second kind is where you say you earned money, but you decide, 'I am just not going to pay the Government. Why should I pay them? I can use the money myself'." (R. 2895)

The pertinent provisions of the statute.

I.R.C. of 1939, § 145(b) provides in part pertinent:

"* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall * * * be guilty of a felony * * *."

The case law.

No case of which we are aware has sustained a conviction under I.R.C. § 145(b) on the Government's theory submitted to the jury. The Government's construction of the statute would render its constitutionality extremely doubtful, and

no intent that it be so construed was manifest from any congressional act.

The cases uniformly hold that where taxpayers properly and truthfully disclose their sources of taxable income and properly report their tax liability, i.e., where no tax deficiency is proved, there is no felony under § 145(b).

In *Spies* v. *United States*,[50] the taxpayer had failed either to file a tax return or pay the tax even though he was by law required to do so. In construing I.R.C. of 1939, § 145(b), this Court said (p. 498):

> "But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, *where there had been no willful failure to disclose the liability*, is intended to constitute a *criminal offense of any degree*." (Emphasis added.)

In view of the highly questionable constitutionality of basing crime on intentional default in payment absent a tax deficiency, it is not to be presumed that the Congress intended that intentional default in payment, however consummated, is criminal.[51]

This Court in *Spies* did state that proscribed felony conduct includes "concealment of assets or covering up sources of income" (at p. 499).

However, these words were included in a series of examples of felony conduct—all of which expressed methods of preventing and impeding the determination of the true tax due and none of which had any reference to conduct designed to thwart collection of the true tax reported. We read *Spies* to mean that this Court has ruled that wilful failure to disclose the liability is the conduct which the statute aims at

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[50] 317 U. S. 492 (1943).

[51] See *Pollock* v. *Williams*, 322 U. S. 4 (1944); *Yates* v. *U. S.*, 353 U. S. — (1957).

and a tax deficiency in this sense must be alleged and proved.[32]

There are no cases supporting the prosecution's contention and the Court's charge. All the authority both under I.R.C. 145(b) and similarly worded sections of the Internal Revenue Code is to the contrary.[33]

In the *Clay* case, 218 F. 2d 483, the Court in dismissing an indictment like this one under § 145(b), pointed out that although the evidence showed that there was liability for and wilful failure to pay the taxes, guilt could be posited only on a tax deficiency. The Court stated appositely:

> "The record evidences an attempt by appellee to test its theory that it can 'make out a felony violation * * * in a "failure to pay" situation.' The government *concedes, as it must*, that allegation and proof of liability for the occupational tax, coupled with a failure to pay it, is not sufficient to constitute a felony violation, but, in addition, there must be some affirmative act on the part of the defendant showing an attempt to evade the imposition of the tax." (Emphasis added.)

The Government has relied herein on *U. S. v. Forcio*, 224 F. 2d 255 (7 Cir. 1955) cert. den. 350 U. S. 883 (1956), as some support for its theory in the case at bar. This reliance is misplaced.

Bardin was a case involving a tax deficiency; the prosecution was based on the net worth theory. The net income reported by Bardin on his return for the tax year in question was $528,824.56. The proof showed that his net income for

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[32] Thus, in Gilman, *Current Problems in Criminal Tax Fraud*, 33 Taxes 749, 752 (1955), the principle is stated as follows: "* * * under the law as it is now, a deficiency must be proved in order to sustain the felony conviction under Section 7201." § 7201 of the 1954 Code is the successor to § 145(b) of the 1939 Code under which Lawn was prosecuted.

[33] *Clay* v. *U. S.*, 239 F. 2d 196 (5 Cir. 1956); *Clay* v. *U. S.*, 218 F. 2d 483 (5 Cir. 1955) (I.R.C. § 2707(c) (1939)); *Jones* v. *U. S.*, 164 F. 2d 398 (5 Cir. 1947) (I.R.C. § 145(b)); cf. *Moody* v. *U. S.*, 207 F. 2d 998 (5 Cir. 1953), cert. den. 347 U. S. 933 (1954).

that year was actually $758,713.94 and the indictment alleged that the tax owing was $639,841.28, more or less, or approximately $111,000 more than the net income Bardin reported. In short, Bardin had failed to disclose his true tax liability and the Government established a tax deficiency.

At bar, to the contrary, the indictment alleged that the taxes due were as reported. The theory of the instant prosecution and the Judge's charge as shown above, were that the net income and taxes due of the taxpayers were properly reported and disclosed. Accordingly, one essential element of pleading and proof of crime — failure to disclose the true tax liability — is missing.

The Government's attempt to ground crime on concealment fails for another reason. Count 9 does not charge concealment of the taxpayers' assets. Count 9 simply charges that the defendants converted the taxpayers' money for their own use. The proof as to Count 7 shows only that Giglio dissipated his means of payment. This is neither concealment nor crime.[54]

It cannot be said that the indictment pleads or the proof shows a case which is plainly and unmistakably within the statute. "Before a man can be punished, his case must be plainly and unmistakably within the statute."[55]

Since Counts 7 and 9 are legally insufficient, Count 10 must fall because there was no showing or pleading of any attempt on the part of Lawn to aid any taxpayer to evade the reporting of his true tax liability. Count 10 fails because the claim of Lawn's connection with the alleged conspiracy is limited solely to the phases thereof covered by Counts 7 and 9.[56]

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[54] *U. S. v. Schireson*, 116 F. 2d 881, 883-4 (3 Cir. 1940); *U. S. v. Camp*, 140 F. Supp. 98, 100 (D. Haw. 1956); *U. S. v. Alper*, 156 F. 2d 222, 224 (2 Cir. 1946); *Levinson v. U. S.*, 47 F. 2d 451 (6 Cir. 1931).

[55] *U. S. v. Brewer*, 139 U. S. 278, 288 (1891).

[56] *Cleaver v. U. S.*, 238 F. 2d 766, 770 (10 Cir. 1956); *Ellis v. U. S.*, 138 F. 2d 612, 622 (8 Cir. 1943).

VI.

PETITIONER WAS ENTITLED TO ACQUITTAL ON ALL COUNTS. THE INDICTMENT WAS NOT PROVED PRIMA FACIE.

The record is barren of requisite proof needed for a *prima facie* case against petitioner. The paucity of the allusions to petitioner in the record is in striking contrast with its bulky size.

As an aid to this Court, we have set forth *infra* p. 80 on one page, in Schedule form, a citation to every single reference in the record, directly or by implication, to petitioner Lawn. Analysis thereof conclusively demonstrates that:

There is no proof whatever of guilty knowledge, criminal intent or purposive entry into any criminal venture on the part of this petitioner.

There is no proof that petitioner joined in conspiracy; nor that any contribution essential to its success came from him; nor that he had any purposive attitude towards it; nor that he had any stake in its success; nor that he obtained any fruits of conspiracy; nor that he knowingly associated in any unlawful common enterprise; nor that he had any knowledge that he was helping to carry forward any crime or phase of conspiracy; nor that petitioner ever agreed with anyone to advance an improper joint interest.

The hypotheses as to petitioner's guilt advanced by the Government heretofore and by the Court below break into eight categories.

(1) Lawn is said to have had the requisite guilty knowledge because he was "legally astute" and the transactions "proliferated around him." The Solicitor General has heretofore said merely that Lawn had knowledge of the "legal, financial and tax problems of the enterprises."

(2) Lawn is said to have participated in much of the planning of the conspiracy. The Solicitor General has heretofore argued only that Lawn was present at the planning.

(3) Lawn is said to have formed the "American" Corporations for tax evasion purposes.

(4) Lawn is said to have been the taxpayer's legal adviser.

(5) Lawn is said to have participated in the New Jersey receivership for tax evasion purposes.

(6) Lawn is said to have been valuable to the conspiracy because of alleged government contacts.

(7) Lawn is said to have aided Giglio to conceal his assets.

(8) Lawn is said to have been paid for services in furtherance of conspiracy. The Solicitor General has heretofore argued merely that Lawn was paid for services.

Each of these hypotheses is factually unproved in the record or legally erroneous and is based on invalid, unauthorized and unconstitutional presumptions, assumptions and inferences.

The Government's testimony squarely contradicts each of these hypotheses. They depend on evidence having no probative effect as to Lawn and establishing no connection with the crimes charged. For example, the alleged supporting evidence relates to what others said about Lawn in his absence; to acts after the end of the conspiracy; to acts of others which antedated the formation of the conspiracy or the limitary period; to acts of others having reference to collateral black-marketeering or collateral frauds on creditors; to post-conspiracy acts of Lawn to head off prosecution.

The hypotheses invalidly equate mere presence with affirmative acts and they bottom guilt on Lawn's association with the others as a salaried employee.

We turn now to a detailed analysis of the evidence and of the Government's hypotheses.

No proof of requisite guilty knowledge.

Since the taxes allegedly evaded were not owed by Lawn, the Government was bound to prove that Lawn knew that the taxpayers (a) owed taxes, (b) did not pay them and (c) had no intention to pay them. No such proof was made.

The Judge so charged as to Counts 7 and 9 (R. 2716), and the Government was bound to prove these elements of the alleged crimes as the law of the case.[57]

The same element of guilty knowledge was an essential which the Government was required to prove on the conspiracy count, since such knowledge was an essential element of the substantive counts encompassed by the conspiracy count.[58] Proof of such knowledge was essential in order to prove both wilfulness (a statutory requirement) and criminal intent;[59] and a defendant may not be convicted of conspiracy unless he is proved to have knowledge of the conspiracy.[60]

Neither the Government nor the Court below has pointed to a single piece of evidence which even squints in the direction of proving the knowledge requisite for conviction of Lawn.[61]

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[57] *Pelz* v. *U. S.*, 54 F. 2d 1001, 1003 (2 Cir. 1932).

[58] *U. S.* v. *Ausmeier*, 152 F. 2d 349 (2 Cir. 1945); *Fulbright* v. *U. S.*, 91 F. 2d 210, 211 (8 Cir. 1937).

[59] *U. S.* v. *Pechenik*, 236 F. 2d 844 (3 Cir. 1956); *Forster* v. *U. S.*, 237 F. 2d 617 (9 Cir. 1956); *Legatos* v. *U. S.*, 222 F. 2d 678, 688 (9 Cir. 1955); *Harding* v. *U. S.*, 179 F. 2d 419, 422 (6 Cir. 1950).

[60] *U. S.* v. *Falcone*, 311 U. S. 205, 210-11 (1940).

[61] The Solicitor General in his brief opposing certiorari contended that Lawn knew "the legal, financial, and tax problems of the enterprises" (citing R. 883, 989, 1096, 1122-3, 1135, 1144-5, 1178-6, 2154-5).

It is to be noted that the Solicitor General did not claim that Lawn knew that the taxpayers owed taxes, and did not pay them, and did

The prosecutor's thesis was his opinion that only Lawn was smart enough to work out the alleged tax evasion schemes (R. 2596-7 2631); and that it should be assumed or presumed therefore that Lawn had the requisite knowledge (*e.g.*, R. 1365).

The Court below held that the requisite but unproved guilty knowledge should be presumed because Lawn was of "admitted legal astuteness." The Court below noted that because the transactions "proliferated around" Lawn it would be "wholly amazing" to credit Lawn with lack of knowledge (R. 2968).

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not intend to pay them. That is the requisite knowledge which the Government must prove, not knowledge of legal, financial and tax problems.

Moreover, the record references cited do not support the Solicitor General's thesis.

The cited record references disclose: Lawn was to buy corn (R. 883); Lawn brought in Portner and Rabkin, reputable tax experts, whom Lawn knew, to advise Roth on tax matters; at Lawn's request Roth prepared a truthful statement which Roth handed to Portner and Rabkin (R. 998-90), so that they could give proper tax advice, which they did (R. 1006). Roth prepared a statement for Dun and Bradstreet at Lawn's request (R. 1122-3). Giglio told Roth, in Lawn's absence, that the minute books were in Lawn's office (R. 1135). Lawn co-signed Ex. 90, an application for extension of time for payment of taxes by corporations expecting carrybacks (on September 19, 1947, after the conspiracy and crimes were completed) which application was prepared by Roth (R. 1144-5) and was accurate when made since there were losses to be carried back (R. 2229). Lawn was present when the New Jersey receivership was discussed and retained Kohn, an attorney, to represent the corporations in receivership. This happened in 1948 (R. 1175-6; 2154-5).

There is not a word about Lawn's guilty knowledge in any of these cited references. They do not show that Lawn had knowledge of the "legal, financial and tax problems of the enterprises."

The Solicitor General's references to pages R. 2154-5 are unwarranted for another reason. The Government rested at page R. 2073; Lawn rested at the close of the Government's case without testifying or offering any evidence at page R. 2116. Hence, the evidence relied on now by the Government and admitted after page R. 2116 cannot be used to sustain Lawn's conviction. *U. S. v. Postma*, 242 F. 2d 488 (2 Cir.), cert. den. 353 U. S. — (1957); cf. *U. S. v. Calderone*, 348 U. S. 160, rev. (1954).

To refuse to credit Lawn with lack of knowledge does not satisfy the requirement of proof of knowledge. The constitutional presumption of innocence does not yield to the conjecture that absence of guilty knowledge would be wholly amazing, nor can guilty knowledge be inferred from legal astuteness.

This Court has appositely held: "Such incriminating presumptions are not to be improvised by the judiciary."[62]

Nor could the Court below infer guilty knowledge from legal astuteness, since plainly legal astuteness has no relevance to guilt.[63]

Lawn did not testify. Constitutionally, the Government was bound to give proof of the essentials of the crime charged to Lawn. Mere speculative disbelief that Lawn could honestly claim lack of knowledge "does not supply proof that the defendant participated in, directed or knew" the essential facts.[64] But further than this, Lawn's "legal astuteness" is itself an inference. There is no direct proof that Lawn was legally astute—indeed when the occasion seemed suitable, the prosecutor classified Lawn as only a mediocre law student (R. 250).

The plain gap in the proof was bridged by the Court below by drawing an inference of guilty knowledge from an inference of legal astuteness. This reasoning is impermissible as piling inference on inference.[65]

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[62] *Morissette* v. *U. S.*, 342 U. S. 246, 275 (1952). Not even the Congress may improvise such damning presumptions and assumptions. p. 275 of 342 U. S.

[63] Due process makes it impermissible "thus to shift the burden by arbitrarily making one fact [legal astuteness], which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation." *Tot* v. *U. S.*, 319 U. S. 463, 469 (1943); *Morissette* v. *U. S.*, cit. *supra*, n. 62 at p. 275.

[64] *U. S.* v. *Pechenik*, 236 F. 2d 844, 847 (3 Cir. 1956). Conjecture or suspicion that Lawn had guilty knowledge is likewise no substitute for proof. *Thomas* v. *U. S.*, 239 F. 2d 7, 10 (10 Cir. 1956).

[65] *Johnson* v. *U. S.*, 192 F. 2d 673 (8 Cir. 1951); *Watson* v. *U. S.*

The factual record in this case precludes and contradicts the invalid and unconstitutional inferences and presumptions utilized by the Court below.

Time and time again the prosecutor sought to elicit testimony from the Government witnesses that Lawn was present at a meeting where he could have, or had otherwise, acquired guilty knowledge. Each time the Government's own witness unequivocally exculpated Lawn.[66]

Although Roth "knew exactly what happened" (R. 1285), Roth removed Lawn from culpability and identified persons other than Lawn with all phases of the alleged tax crimes.

Thus Roth testified: It was he, Roth, who set up the cash box (R. 1026); it was Roth who handled the books (R. 1076); it was Ronayne who handled the taxes (R. 999, 1076); it was Ronayne's duty to take care of the tax returns (R. 1031); it was Rabkin who was consulted on taxes (R. 1066); and it was Giglio who made the final decisions (R. 1076) and Lawn was not present when the make up of the tax returns as filed was discussed (R. 1031).

Lawn's duties were to handle research and export-import affairs (R. 1023), and the proof showed that *it was research, not taxes*, that Lawn discussed with Roth (R. 1070).

In *U. S. v. Pechenik*,[67] the Court appositely held:

> "It is suggested by the government that it is incredible that the defendant did not know all along that capital expenditures were improperly treated; hence he knew the corporation's tax returns were false. This suggestion, however, does not arise from the evidence, but rather from unwillingness to believe that the evidence is true. * * *. But disbelief does not supply proof that the defendant participated in, directed or knew the books were kept incorrectly."

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[66] See, *e.g.*, R. 352, 358, 397, 998, 999, 1004, 1005, 1008, 1009, 1024, 1026, 1028, 1031, 1036, 1038, 1069, 1072, 1076, 1092, 1095, 1099, 1112-3, 1114, 1119, 1120-1, 1123, 1125, 1134, 1135, 1136, 1141, 1148, 1149, 1181.

This Court has time and again held that want of proof cannot be supplied by rejecting record evidence.[88]

No proof that Lawn planned, joined or participated in crime.

There is absolutely no evidence that Lawn participated in the planning of or the commission of any tax evasion scheme, or that Lawn intended or agreed to cooperate in the commission of any alleged crime.

Count 10 charges a conspiracy to evade taxes due from Giglio, Livorsi, Roth, five corporations surnamed "American," and two partnerships, *viz.*, Eatsum Food Products Ltd. and Tavern Fruit Juice Company.

This conspiracy encompasses the substantive charges set forth in the other nine counts. We show, *infra*, that Lawn had no connection with the matters charged in counts 7 and 9.

The crimes alleged in counts 1, 2, 3, 4, 5, 6 and 8 were, according to the Government, completed. The Government did not charge Lawn with aiding, abetting or in any manner being an accessory or connected with those seven crimes, and there is no proof of any connection of Lawn to those crimes. This is cogent evidence that Lawn had no part in any conspiracy to commit those crimes.

Since Lawn is not shown to have any connection with any of the substantive counts which comprise the entire conspiracy, the conspiracy count must be dismissed.[89]

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[88] *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 576 (1951); *Bunt* v. *Sierra Butte Gold Min. Co.*, 138 U. S. 483, 485 (1891).

[89] *Cleaver* v. *U. S.*, 238 F. 2d 766, 770 (10 Cir. 1956); *Filo* v. *U. S.*, 138 F. 2d 612, 622 (8 Cir. 1943).

The language of *Yates* v. *U. S.*[70] is equally *apropos* as to Lawn:

> "So far as this record shows, none of them has engaged in or been associated with any but what appear to have been wholly lawful activities or has ever made a single remark or been present when someone else made a remark, which would tend to prove the charges against them."

Nevertheless, for purposes of completeness we outline the evidence irrespective of its probative effect or admissibility as against Lawn.

The indictment was obtained on July 23, 1953. The applicable statute of limitation is six years.[71]

For purposes of limning the applicable law we relate the alleged crimes and conspiracy in its three phases:

1.—The stale and barred act phase, covering the period prior to July 23, 1947.

2.—The phase between that date and the end of the conspiracy—July 23, 1947 to mid-September 1947.

3.—The post-termination phase—that period subsequent to mid-September 1947.

The totality of evidence covering all three phases of the alleged crimes is absolutely barren of any circumstances or direct proof of an agreement on the part of Lawn to participate in any tax evasion. One of the alleged conspirators (Roth, who "knew exactly what happened") (R. 1285) testified for the Government. At no time did Roth testify that Lawn was a party to any such agreement. The only possible explanation for the voluble Roth's silence on the subject is that Lawn was not a party to any such agreement. Without such participation Lawn was entitled to acquittal.[72]

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[70] 355 U. S. —, (1957).

[71] I.R.C. § 6531 (1954).

[72] *U. S.* v. *Falcone*, 311 U. S. 205 (1940).

We turn to a discussion of each of the aforesaid three phases of the alleged conspiracy and crimes:

a. Lawn did not plan, join or participate in crime during the stale and barred act phase.

The evidence on this pre-July 23, 1947 phase, is:

Lawn was an employee of Tavern earning $250 to $350 a week salary for services rendered as the man in charge of research (R. 1023).

Lawn had no official connection with Eatsum (R. 329). His sole contacts were that he once negotiated a sale of some corn syrup or a purchase of corn from farmers (R. 1092); and Lawn once told Lubben that Lawn could have someone buy corn better, cheaper and faster (R. 333).

Lawn did not form corporations for tax evasion purposes.

Giglio told *Lubben*, in 1945, allegedly in Lawn's presence, that Giglio's profits were tremendous, that Giglio was not interested in paying a lot of taxes, and that something had to be done and done quickly. Giglio is supposed to further have told *Lubben* that Giglio would form a number of corporations, siphon off Eatsum's profits through "phony" invoices from the corporations to Eatsum and then dissolve the corporations in five or six months before the time arrived to pay taxes (R. 367-8).

Lawn said nothing and took no part in the conversation (R. 367-8). Roth, who was also allegedly present, denied that any such conversation took place in Lawn's presence (R. 1125).

As matter of law this statement was not evidence as against Lawn since on its face it antedated the formation of any conspiracy[7]—the statement speaks only of future events.

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[7] *Manner* v. *U. S.*, 57 F. 2d 506 (10 Cir. 1932); *Bartlett* v. *U. S.*, 166 F. 2d 920 (10 Cir. 1948); *Morrow* v. *U. S.*, 11 F. 2d 256 (8 Cir. 1926).

Moreover, this alleged scheme was never carried out. The various corporations formed were not dissolved, and indeed, it is these very corporations which are here charged with tax evasion. No "phony" invoices were in fact issued, and the profits of Eatsum were not siphoned off through corporations.

Of course, the mere fact that Lawn was present at such conversation does not make him a participant in any crime. Thus, in *Cleaver* v. *U. S.*,[74] the Court stated the universal rule (p. 771):

> "Webster, however, *did not participate* in the planning or the commission of the burglary, although *he was present* during a number of the conversations among the various conspirators. Mere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy, *without an intention and agreement to cooperate* in the crime is insufficient to constitute one a conspirator." (Emphasis added.)

Whatever may have been the intent of Giglio, Lubbeck and Roth, as to evasion of taxes, that was not Lawn's intent. It was Lawn's intent to create a dynasty of sugar, candy and jelly (R. 1124-5).

Thus Roth unequivocally testified (R. 1124-5):

> "A. Mr. Lawn was instrumental in organizing these corporations in January, 1946, in anticipation that this process of substitute sugar would be effected, and we organized a corporation called American Candy Corporation, because the substitute of sugar is used in candy, American Sweets for maraschino cherries because sugar is used in that product. A trucking corporation, a finance corporation, American Brands Corporation, American Brands Wholesale Corporation, American Agar Corporation for research.
>
> At that time he [Lawn] said, 'The only time that I know that we will be successful is when the Depart-

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[74] 238 F. 2d 766 (10 Cir. 1956).

ment of Justice—when we have to defend ourselves against the Department of Justice on an antitrust lawsuit, and we are going to have a small dynasty within our organization'."

It is thus crystal clear that if Roth, Giglio and Lubben intended to form corporations for the purpose of dissolution and tax evasion, and that a conspiracy was formed to achieve that end, Lawn rejected that end and was working for a diametrically opposed result. Lawn thus had no part in any such crime, and he sought only to create a "dynasty" dealing in sugar, candy and jelly.

Lawn did not form the corporations; this was handled by Rossbach, a New Jersey attorney (R. 1115).

None of the pre-July 23, 1947 evidence was proof or admissible against Lawn. Such stale acts are admissible only to show that a defendant became a party to the conspiracy charged [75] and the continuation thereof.

The so-called proof does not relate to any agreement or intention on the part of Lawn to join in any crime or conspiracy and therefore as to Lawn such stale acts could not show a continuation thereof. Hence, they have no probative effect as to Lawn whatsoever.

b. Lawn did not plan, join or participate in crime during the July 23 to mid-September 1947 phase.

The record discloses that the only things that occurred in this phase of the case (other than Lawn drawing a salary and the Giglio house transaction, discussed *infra*), were the preparation and filing by Roth of the tax returns of the various taxpayers.

There is absolutely no proof or attempt to prove whatsoever that during this phase of the case Lawn joined in any

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[75] *Pinkerton* v. *U. S.*, 145 F. 2d 252, 254 (5 Cir. 1944); *U. S.* v. *Schneiderman*, 106 F. Supp. 892, 899 (S. D. Cal. 1952).

conspiracy or crime or agreed to or intended to participate therein.

Lawn was not legal or tax adviser to taxpayers.

The evidence is conclusive that Lawn had nothing to do with the accounting books, the preparation of the data for the tax returns, or the nonpayment of the taxes, or any matter legal or otherwise in connection with the returns or nonpayment of the taxes. This was all done by others (R. 999, 1006, 1026, 1031, 1076); and Roth, who made out the tax returns, subject to the supervision of Romayne and the final "okay" of Giglio, never discussed any of the tax problems or tax returns with Lawn (R. 998, 1004, 1024, 1026, 1038, 1119, 1121, 1125, 1134, 1135, 1182). Lawn was not present at the discussion when the tax returns were being filed (R. 1031).

Lawn did not act as counsel for any of the taxpayers. They retained others as attorneys for even the simplest transaction (R. 1005-6, 1076, 1115, 1223, 1470; 2168, 2230).

When Lawn learned that Roth had mistakenly included a corporation in which Lawn was interested, named Lawn International, in the consolidated tax return filed by the "American" corporations, Lawn demanded that Roth delete Lawn International therefrom (R. 1112-3), and Lawn International was stricken from the affiliation schedule (R. 1112-3). At that time American Agar, one of the "American" corporations in which Lawn was a stockholder, was not included in the affiliation schedule (R. 1113), and Roth did not discuss with Lawn the inclusion of Agar therein (R. 1134).

In short, the evidence is conclusive that Lawn did not join the conspiracy or crime during this phase of the case.[76]

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[76] *U. S. v. Liss*, 137 F. 2d 995 (2 Cir.), cert. den. 320 U. S. 775 (1943); *U. S. v. Carangella*, 198 F. 2d 3, 7 (7 Cir.), cert. den. 344 U. S. 881 (1952); *U. S. v. Ah Kee Eng*, 241 F. 2d 157 (2 Cir. 1957); *Butler v. U. S.*, 197 F. 2d 561 (10 Cir. 1952). "So far as the evidence discloses he merely stood by and watched the game with indifference." *Donovan v. U. S.*, 54 F. 2d 193, 194 (3 Cir. 1932).

c. Lawn did not plan, join or participate in crime during the post-termination phase.

The alleged conspiracy ended in mid-September 1947. The outcome of the alleged tax conspiracy was irrevocably fixed and determined when the tax returns were filed in mid-September 1947.

The alleged conspiracy was dissolved in mid-September 1947.

The alleged conspiracy seems to have two tentacles: A conspiracy to file false tax returns and a conspiracy to conceal assets so as to thwart the collection of taxes. It is obvious that the conspiracy to file false tax returns ended with the filing thereof (R. 2706, 2708, 2711, 2713, 2715), and the conspiracy to conceal necessarily ended also with the filing of the tax returns (R. 2716, 2718) and the prosecutor so conceded (R. 2890).

As matter of law the substantive crimes were completed with the filing of the alleged false returns and concealment, if at all, was then accomplished;[77] the tax was then due and hence the conspiracy too ended in mid-September 1947.[78]

The ends allegedly sought had, upon filing of the tax returns, been achieved, and the alleged conspiracy was then dissolved.[79]

There is no allegation of a continuing conspiracy to thwart prosecution. Accordingly, none of the post mid-September

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[77] *Gazick* v. *U. S.*, 54 F. 2d 618 (7 Cir.), cert. den. 285 U. S. 545 (1932); *U. S.* v. *Mathis*, 28 F. Supp. 582 (D. N. J. 1939).

[78] *Irvick* v. *U. S.*, 329 U. S. 211 (1946); *U. S.* v. *Maloney*, 200 F. 2d 344 (7 Cir. 1952).

[79] *Grunewald* v. *U. S.*, 353 U. S. 391 (1957); *Bollenbach* v. *U. S.*, 326 U. S. 607 (1946); *McDonald* v. *U. S.*, 89 F. 2d 128 (8 Cir.), cert. den. 301 U. S. 697 (1937).

1947 acts and statements of others are evidence against or admissible against Lawn.[80]

There is no evidence against Lawn during the post-termination phase.

There is not a single statement made or act done by Lawn in the post-termination period, or for that matter at any time, which indicates in any manner that Lawn either joined the conspiracy, participated in its planning or intended or agreed to cooperate in its execution. Nonetheless, we review the evidence for the purpose of completeness.

Lawn not involved in tax crimes charged through New Jersey Receivership.

Both testified that a scheme was afoot to defraud various creditors of the corporations through a New Jersey receivership thereof. The plan to defraud was outlined by Roth to Kohn, the attorney for the corporations, allegedly in the presence of Lawn without, allegedly, any dissent by Lawn. The plan was to offset debts owing by Roth and others (not Lawn) to the insolvent corporations against debts owing from the insolvent corporations to firms wholly owned by Giglio. This would have the effect of reducing the assets of the insolvent corporations available for distribution to other creditors (R. 1177).

The plan was outlined by Roth not earlier than July or August 1948, when Kohn was employed as an attorney in the New Jersey receivership (R. 2168, 2230).

How such plan could be tortured into evasion of 1946 taxes defies all logic. Lawn was neither a creditor nor a debtor of

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[80] *Grunewald* v. *U. S.*, 353 U. S. 391 (1957); *Krulewitch* v. *U. S.*, 336 U. S. 440, 442-3 (1949); *Fiswick* v. *U. S.*, 329 U. S. 211, 216-7 (1946); *U. S.* v. *Rosenblum*, 176 F. 2d 321 (7 Cir.), cert. den. 338 U. S. 893 (1949); *Cleaver* v. *U. S.*, 238 F. 2d 766, 769 (10 Cir. 1956); *Yokely* v. *U. S.*, 237 F. 2d 455 (9 Cir. 1956).

the corporations (R. 1127). It is plain that any alleged tax evasion plan could not have encompassed the subsequent action of a bona fide creditor throwing the corporations into involuntary receivership (R. 2167).

The mere doing of acts which are ambiguous in that they may or may not have had reference to the unlawful conspiracy alleged, cannot sustain a conviction. The acts must unquestionably relate to the conspiracy alleged.[81]

Further, any such alleged "conspiracy" was separate in personnel and content and remote in time from the alleged conspiracy in New York concerning taxes. To be connected with the conspiracy, any such alleged concealment through the New Jersey receivership would have to antedate September 12-15, 1947, when the returns were filed. The Judge so charged (R. 2717, 2718). Lawn cannot be held through the medium of the alleged New Jersey conspiracy.[82]

No proof that Lawn had value to conspiracy.

The totality of other testimony relating to the post-termination stage, subsequent to mid-September 1947, shows:

Lawn attempted to head off prosecution of the 1950 informations (R. 1218-19, 1237-39). Lawn discussed with other defendants the legal necessity of the Government to prove criminal intent in order to sustain a conviction (R. 1219); and Lawn discussed Roth's testimony before a New Jersey

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[81] *Dale* v. *U. S.*, 66 F. 2d 666, 669-70 (7 Cir. 1933), reversed as to the remaining defendant sub nom. *Massey* v. *U. S.*, 291 U. S. 608 (1934); *Parnell* v. *U. S.*, on rehearing 64 F. 2d 324, 329 (10 Cir. 1933); *Kotteakos* v. *U. S.*, 328 U. S. 750, 776-7 (1946).

[82] *U. S.* v. *Liss*, 137 F. 2d 995 (2 Cir.), cert. den. 320 U. S. 773 (1943). Of course Lawn's mere presence at the conversation did not make him a member even of the alleged conspiracy to defraud creditors, much less a tax evasion conspiracy. *Cleaver* v. *U. S.*, 238 F. 2d 766 (10 Cir. 1956). A conspiracy in fraud of creditors is not a conspiracy to conceal assets. *U. S.* v. *Camp*, 140 F. Supp. 98, 100 (D. Haw. 1956).

Grand Jury investigating Lawn's personal income taxes (R. 1075) which are not in issue here.

All of these alleged acts and statements made by Lawn, occurred after Lawn and the others had been arrested and arraigned under informations filed in 1950 (R. 2765-6). These informations related to the same alleged tax evasion as is alleged in the conspiracy at bar (R. 2783-4).

Obviously, the conspiracy had ended at that point, and whatever was thereafter said or done cannot possibly have been in furtherance of the conspiracy; and self-evidently it is impossible to join a conspiracy after it has ended.[83]

Lawn's alleged attempts to head off prosecution of himself were certainly natural reactions on his part in view of the circumstances. He was under information, he was being investigated; nothing could be more natural or proper than that Lawn should retain an attorney to discuss the information with the United States Attorney or that Lawn should communicate with the United States Attorney's superior in connection with the information. Since Lawn was being investigated in New Jersey it was certainly natural that he should discuss with Roth that Grand Jury matter. And it defies all common sense to believe that the discussion of a defense to a criminal action makes one a conspirator. Tested by any standards Lawn's reactions did not authorize a finding that Lawn was a conspirator.[84]

Further, these alleged acts to head off prosecution cannot constitute proof that Lawn was part of the alleged initial agreement to evade 1946 income taxes owed by others.[85]

The Solicitor General in his brief opposing certiorari pinned major reliance on a statement made by Roth in mid

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[83] Cf. *Rizzo* v. *U. S.*, 275 Fed. 51 (3 Cir. 1921).

[84] *U. S.* v. *Carenzella*, 198 F. 2d 3, 7 (7 Cir. 1952), cert. den. 344 U. S. 881 (1952); *U. S.* v. *Wainer*, 170 F. 2d 603, 606 (7 Cir. 1948).

[85] *Grunewald* v. *U. S.*, 353 U. S. 391 (1957).

1953, in Lawn's absence (R. 1218-19). Roth testified that he then told Giglio (R. 1218-19):

> "* * * we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent any indictments; and gradually we are going on the road to ruin, because all that protection and contacts have fallen down."

This statement was made not only after the conspiracy had ended and the informations had been filed, but after all of the defendants had been indicted for the precise crimes charged in the indictment at bar (R. 2766-82). Obviously, this statement of Roth's could not legally draw Lawn into conspiracy and was not binding on or evidence against Lawn.[56]

This statement of Roth was made in the absence of Lawn, and could not possibly be used to prove that Lawn was a member of the conspiracy. The Judge so charged (R. 2695) and that is unquestionably the law.[57]

The Solicitor General further contended that Lawn's *value* to the conspiracy lay in his alleged close connections with the United States Attorney's offices in New York and New Jersey, and the Department of Justice in Washington. The Solicitor General cited the following references for such contention (R. 329, 1074-5, 1217-19, 1237-9).

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[56] *Krulewitch* v. *U. S.*, 336 U. S. 440, 442-3 (1949); *U. S.* v. *Rosenblum*, 176 F. 2d 321 (7 Cir. 1949), cert. den. 338 U. S. 893 (1949); *U. S.* v. *Ah Kee Ing*, 241 F. 2d 157 (2 Cir. 1957).

[57] *Glasser* v. *U. S.*, 315 U. S. 60, 74 (1942); *U. S.* v. *Reina*, 242 F. 2d 302 (2 Cir. 1957); *Minner* v. *U. S.*, 57 F. 2d 506 (10 Cir. 1932); *U. S.* v. *Carcagella*, 198 F. 2d 3 (7 Cir. 1952), cert. den. 344 U. S. 881 (1952). Lawn's membership in the conspiracy could be shown only by his acts and statements and not the acts and statements of others. *U. S.* v. *Schneiderman*, 106 F. Supp. 892, 901 (S. D. Cal. 1952); *Bartlett* v. *U. S.*, 166 F. 2d 920, 924 (10 Cir. 1948); *Mayola* v. *U. S.*, 71 F. 2d 65, 67 (9 Cir. 1934).

Of these record references, R. 1074-5, 1218, 1237-9, do not support the contention of the Solicitor General even colorably. These relate to alleged unsuccessful attempts by Lawn to head off prosecution and have been discussed *supra*. The remainder of the record references relate to what someone told Lubben or Roth about Lawn in Lawn's absence. As matter of law and the Judge so charged (R. 2695) such extra-judicial declarations are not proof that Lawn was a party or had any value to the conspiracy.[88]

No proof that Lawn aided Giglio or ABC to conceal assets or that Lawn was paid for criminal services.

The Government made no attempt to link Lawn to that phase of the alleged crimes which encompassed filing false tax returns. The Government's attempt was solely to link Lawn to crime through an alleged plan to conceal the assets of Giglio and ABC so as to prevent the collection of taxes due from them.

These charges are repeated in Counts 7 and 9 as substantive crimes.

The alleged concealment of ABC's assets is then made to do double duty. It is argued that since Lawn received a salary for his legitimate employee services he diverted ABC's assets to his own use and was paid for his alleged criminal activities.

We dispose of these arguments shortly; and the refutation thereof requires acquittal on all counts as to Lawn.

The theory on which the concealment phase of the case was submitted to the jury was that the respective taxpayers correctly reported their incomes and taxes due, but that the taxpayers wilfully failed to pay the same. The jury was charged that guilt could only be predicated on a finding of

[88] See cases cited *supra*, ftn. 87.

intentional concealment of capital assets, at or about the due date of the taxes (September 12-15, 1947), to prevent collection of the taxes (R. 2716, 2718).

There was no concealment of assets.

The charge seems to be that Lawn in some unascertainable manner concealed in the Southern District of New York, Giglio's interest in a home, owned by Giglio and his wife as tenants by the entirety even though this piece of real property is located in Rumson, New Jersey, and that Lawn diverted ABC's assets to his own use even though the totality of assets received by Lawn was his salary for legitimate services rendered as an employee.

The facts in brief are:

Lawn, who was familiar with the geography of New Jersey since he was a resident thereof, set out to locate a house for Giglio and wife; introduced Giglio to a real estate agent and discussed the price of the house with the agent (R. 948, 951, 953).

In 1946 Giglio and his wife purchased, *as tenants by the entirety*, a home in Rumson, New Jersey, from the Barbour estate. Giglio and his wife took title to the house subject to a $50,000 mortgage (Ex. 161, R. 2056). Both the deed and the mortgage were publicly and promptly recorded in the clerk's office, Monmouth County, New Jersey (Ex. 161, R. 2056, 966).

On September 11, 1947 Giglio and his wife entered into a contract to sell their house to the Government's witness, Roth. Lawn introduced a reputable New Jersey real estate expert—a lawyer friend of his—to represent the Giglios on the closing. This was a New Jersey transaction. The introduction was perfectly legitimate (R. 1220, 1223). The contract was drawn in standard New Jersey real estate form (Ex. 100, R. 1224), by Tepper, the New Jersey real estate lawyer (R. 1224). The events leading up to this contract were:

Giglio was hard pressed for money and owed Roth some $20,000, and needed further sums to maintain the home, to meet mortgage and tax payments, and the like (R. 1220).

To induce Roth to advance a further sum of $10,000, and to secure the sums already owing to Roth and to protect the home in case of a future tax assessment, Giglio and his wife entered into a security arrangement with Roth under which Giglio and his wife conveyed legal title to the house to Roth and took back a second mortgage from Roth representing the Giglios' entire equity in the house (R. 1220, Ex. 53, R. 957, Ex. 55, R. 959). Both the deed to Roth and the mortgage from Roth to the Giglios were immediately and simultaneously recorded publicly, in the clerk's office, Monmouth County, New Jersey (R. 966, Ex. 53, R. 957, Ex. 55, R. 959).

On June 25, 1948, Roth sold the home to the Martins (Ex. 54, R. 959), took out of the proceeds of the sale the amounts owing from Giglio to him, and paid the balance less the first mortgage to Giglio (R. 1223, 1229). Giglio received $16,954.59 out of the proceeds of the sale.

The assets of ABC allegedly converted by Lawn were in fact, as shown by the evidence, only Lawn's salary received by him for legitimate employee services.

The Government's bill of particulars, which specified what was wrong with the corporate tax returns, underscores the legitimacy of Lawn's salary as a proper business expense to ABC:

> "a) Consolidation disallowed. $63,091.52 additional deduction allowed, consisting of $72,321.17 opening inventory allowed but not claimed, less $9,229.65 purchase expense disallowed." (R. 23)

The bill of particulars did not disallow one cent of expenses, which included Lawn's salary, deducted by ABC on its 1946 tax return (R. 23).

The Government thus necessarily conceded that the expense items so deducted were actually incurred, were reason-

able in amount, and were not wrongful diversions or appropriations by Lawn or the others.

The so-called withdrawals or diversions were traced into the very deductions which the Government specifically has allowed. The Special Agent, Mr. Present, did this tracing. He testified:

> "A. Well, there was usually an entry made to charge them either to selling expense or to one of the other entertaining expenses." (R. 1917)

> "Q. And you did not disallow any of these items, am I correct? A. No, sir, these were all in the year 1947, sir. There were similar withdrawals in the year 1946, though. None of those were disallowed." (R. 1919)

The so-called withdrawal by Lawn was the sum of $10,196.87, which Lawn received as salaries for services rendered in 1947 to all the corporations surnamed "American" (R. 1917). No allocation of any part of this total was identified as having emanated from the taxpayer, ABC. The Government agent, Mr. Present, testified that the payments to Lawn were in unspecified part salary due to Lawn, and that the total paid to him was charged on the books to various expense accounts (R. 1923).

The Government witnesses specifically proved that Lawn was an employee and was entitled to salary for services actually rendered (R. 1023). The unascertained portion of these salaries paid by ABC to Lawn were the sole assets of ABC received by Lawn; and there was no issue of excessiveness asserted in connection therewith.

Lawn did not sign any of the checks of ABC mentioned as being converted by others. Lawn did not receive any cash withdrawals from ABC. Lawn did not authorize anyone else to make withdrawals from ABC, and he had no authority to do so. Lawn did not have or maintain the accounting books and did not even know of the withdrawals.

On this record, there was no concealment.

Giglio's equity in the house, whether represented by title subject to mortgage or by a mortgage on the fee, was always a matter of public record. This equity was recorded publicly in the proper office and was at all times subject to levy by his creditors, including the United States, to whom notice was given by the public recording. Giglio did not prevent the discovery or withhold knowledge of his said equity.

Plainly, the "sale" of the house by Giglio and wife to Roth to pay or to secure past obligations and further advances was not concealment.[59]

The interest of Giglio in the fee was that of tenant by the entirety. This interest was not subject to immediate levy by creditors of Giglio unless he survived his co-tenant. However, his interest in the mortgage was subject to immediate levy by creditors. *Servis* v. *Dorn*, 76 N. J. Eq. 241 (1909).

In short the transactions between Giglio and Roth, far from constituting concealment, made an asset subject to levy which was previously not leviable.

The use or misuse of a taxpayer's funds is not concealment.[60]

No proof that Lawn had any stake in or rendered aid to any crime.

Lawn had no stake in the success of the alleged schemes, and did not aid and abet in any manner the transactions

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[59] *U. S.* v. *Alper*, 156 F. 2d 222, 224 (2 Cir. 1946); *Iverson* v. *U. S.*, 47 F. 2d 451 (6 Cir. 1931).

[60] *Hersh* v. *U. S.*, 68 F. 2d 799 (9 Cir. 1934); "The crime of concealment is concealment. It is not an improper use of funds, it is not the use of corporate funds for personal expenses, it is not even the use of funds in fraud of creditors." *U. S.* v. *Camp*, 140 F. Supp. 98, 109 (D. Haw. 1956).

Concealment is neither the dissipation of nor the making of gifts of the taxpayer's funds. *U. S.* v. *Schiveson*, 116 F. 2d 881, 884 (3 Cir. 1940).

involved. For this additional reason, Lawn could not be held.[31]

Morei v. *U. S.*[32] is illustrative. In *Morei* one Beach approached the defendant Dr. Platt to purchase dope from Platt. Beach told Platt that he wanted dope to "soup up" race horses, that he would give Platt the names of the souped up horses, so that Platt, an inveterate horse bettor, could bet on them and win. Platt said to Beach that he (Platt) had no dope, but he gave Beach the name of the defendant Morei and told Beach to tell Morei that Platt had sent him and that Morei would take care of Beach.

The Court held that Platt was not guilty and held (pp. 831-2):

> "Dr. Platt was paid nothing and it is not claimed that he asked for any remuneration or expected to receive anything from the claimed transaction. Accepting the facts as contended for by the prosecution—which are squarely contradicted by the defendant—the only thing Dr. Platt did was to give Beach the name of Morei as a man from whom he might secure heroin to dose horses in order to stimulate them in racing. This is not the purposive association with the venture that, under the evidence in this case, brings Dr. Platt within the compass of the crime of selling or purchasing narcotics, either as principal, aider and abettor or accessory before the fact."

At bar it is not even claimed that Lawn received any remuneration or expected to receive remuneration for any illicit venture. There is no proof that the lawyer who was introduced by Lawn was sought by Giglio to do an illegal

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[31] *Nye and Nissen* v. *U. S.*, 336 U. S. 613, 619 (1949); *U. S.* v. *DeRe*, 139 F. 2d 818 (2 Cir. 1947) affd. 332 U. S. 581 (1948); *Thomas* v. *U. S.*, 239 F. 2d 7, 10 (10 Cir. 1956); *U. S.* v. *Moses*, 220 F. 2d 166 (3 Cir. 1955); *Hubby* v. *U. S.*, 150 F. 2d 165 (5 Cir. 1945); *Morei* v. *U. S.*, 127 F. 2d 827 (6 Cir. 1942); *U. S.* v. *Peoni*, 100 F. 2d 401, 402 (2 Cir. 1938); *U. S.* v. *Dellaro*, 99 F. 2d 781 (2 Cir. 1938).

[32] 127 F. 2d 827 (6 Cir. 1942).

act. The Government's contention at the very worst for Lawn is, that Lawn gave Giglio the name of a lawyer who could prepare proper legal papers and handle a New Jersey title closing, and that Lawn was an employee of ABC and drew salary for his legitimate services as such employee.

Whatever the Government's theory may be, there is no proof that Lawn had any stake in or that he entered into any of the planning of wrongdoing or accepted any alleged wrongful purposes of the taxpayers.

Lawn cannot be held for what others may have done.[92]

Confusion and not proof of crime explains the verdict.

The record is crystal clear that Lawn found himself "confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of [the] existence of the conspiracy itself."[93]

It is the inescapable conclusion from a painstaking reading of the tediously long record herein that the jury's verdict against Lawn was based on automatic reaction to the coupling of Lawn's name with that of the others in a welter of trivia and innocent transactions. Suspicion grounds the verdict herein, not evidence.

The verdict and indictment against Lawn should not stand.[93]

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[92] *Thomas* v. *U. S.*, 239 F. 2d 7, 10 (10 Cir. 1956); *Chaser* v. *U. S.*, 238 F. 2d 766, 771 (10 Cir. 1956); *U. S.* v. *Andolschek*, 142 F. 2d 503, 507 (2 Cir. 1944); *U. S.* v. *Zeuli*, 137 F. 2d 845, 847 (2 Cir. 1943); *Donovan* v. *U. S.*, 54 F. 2d 193 (3 Cir. 1932); and see *People* v. *Baldisero*, 266 App. Div. (N. Y.) 909, c. 3 (4th Dept. 1943).

[93] *Krulewitch* v. *U. S.*, 336 U. S. 440, 453 (1949) (Jackson, J.).

[93] *Kotteakos* v. *U. S.*, 328 U. S. 750, 776-7 (1946); *Wise* v. *U. S.*, 241 F. 2d 545, 547 (5 Cir. 1957); *Thomas* v. *U. S.*, 239 F. 2d 7, 10 (10 Cir. 1956).

VII.

THE JUDGMENT AGAINST PETITIONER SHOULD BE REVERSED AND JUDGMENT OF ACQUITTAL DIRECTED.

Respectfully submitted,

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Schedule.

THE TOTAL TESTIMONY AS TO LAWN IN THE RECORD.

Lawn present, Lawn said or did something

R. 333, 364, 883, 989, 1006, 1019, 1070, 1074-5, 1092, 1112-13, 1122-3, 1123-4, 1134, 1144-5, 1150, 1175, 1216-17, 1219, 1220, 1222-3, 1237-9, 1245, 1470, 1525, 1532, 2053, 2057.

Lawn present or may have been present, Lawn said or did nothing

R. 301, but *cf.* 637 and 839, 319-20, 332-3, 367-69, 370-1 but *cf.* 840-43, 883, 997, 1005, 1149, 1175-6, 1177, 1182.

Lawn not present; Lawn spoken about

R. 318, 329, 362, 883, 1018, 1021, 1073, 1115, 1135, 1141-2, 1153, 1298, 1373, 1374-5.

Prosecutor injects Lawn's name; Government witness rejects

R. 303, 309-10, 329, 348, 352-3, 376, 377, 397, 974, 998, 1004, 1024, 1026, 1095, 1119, 1126-1, 1125, 1128, 1134, 1135, 1136, 1140-1, 1141, 1142, 1148, 1181-2, 1581, 1585, 1687, 1724, 2019, 2020, 2058, *2151, 2207, 2248, 2249, 2279, 2315, 2316.*

Witness excludes Lawn's presence although Lawn not mentioned by name

R. 317, 358, 826, 930-2, 938-9, 983, 1008-9, 1017, 1028, 1029, 1031-2, 1036, 1066, 1067, 1069, 1072, 1072, 1077-9, 1099, 1101-3, 1114-5, 1126-7, 1184, 1234-6, 1246-7, 1409-10, 1726-7.

Miscellaneous references to Lawn

R. 326, 327, 329, 362, 410-11, 306, 626-7, 629-38, 946, 947, 948-50, 951, 952-3, 961, 962, 970-1, 981, 1023, 1116, 1127, 1134, 1138, 1155, 1167, 1203, 1248, 1295, 1886-7, 1907, 1910-11, 1913, 1915, 1917, 1922, 1923, 2051, 2052, 2054, 2070, *2154, 2155, 2196-7, 2227, 2230, 2231, 2232, 2245, 2261, 2279, 2280, 2313, 2419-20, 2433.*

References to pages in italics are to evidence taken after the case as to Lawn was rested on both sides (R. 2116).